INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Questions Presented	4
Statement of the Case	5
A. Introduction	5
B. As to Question 3 (Isbell Patent)	6
C. As to Question 4 (Fraud, Unfair Competition and Antitrust)	7
D. As to Question 5 (Petitioner's Blonder-Schenfeld Patent)	8
Summary of Argument	9
Question No. 1 (re Triplett v. Lowell)	9
Question No. 2	9
Question No. 3 (Isbell Patent)	9
Question No. 4 (re Fraud, Unfair Competition and Antitrust)	10
Question No. 5 (re Petitioner's Blonder-Schenfeld Patent)	11
Argument	12
Question 1 (Re Triplett v. Lowell)	12
Question 2	16
Question 3 (Re Isbell Patent)	16
A. Petitioner Was Deprived of Due Process at the Trial	17
B. The Matter of "Obviousness"	23
C. The "Invention" Was Published More Than a Year Before the Isbell Patent Application Filing Date, in Contravention of 35 USC 102b	26

D. The Isbell Patent Is Completely Anticipated by Prior Art 29
E. The Isbell Patent, Even Were It Valid, Is Not Infringed by the Blonder-Tongue Structures 30
F. Even Were It Valid, the Isbell Patent Is Unenforceable Against Petitioner 34
G. Conclusion as to the Isbell Patent..... 34
Question 4 (Re Fraud, Unfair Competition and Antitrust) 38
A. A Summary of the Unfair Competition and Antitrust Aspects 41
B. The Legal Significance of Such a Series or Pattern of Activities that the District Court Found Had Existed 45
C. The Illegality of the Individual Acts Themselves 45
1. Tie-In Sales 46
2. The Raiding 50
3. The Fraud in the Patent Office and in Advertising 53
4. Patent Mismarking 54
5. Improper News Releases 57
6. False Advertising 59
7. Summary as to the Unfair Competition and Antitrust Counterclaims 62
Question 5 (Re Petitioner's Blonder-Schenfeld Patent) 62
Conclusion 67

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Supreme Court Rule 19(1)(b) 2

Rule 52(a) F. R. C. P..... 63

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 338.

BLONDER-TONGUE LABORATORIES, INC.,
Petitioner,

vs.

UNIVERSITY OF ILLINOIS FOUNDATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 422 F. 2d 769 (1970) and appears at A. 54. In this opinion, Isbell patent 3,210,767 was found valid. The decision of the District Court, Northern District of Illinois, Eastern Division, is not reported but is reproduced at A. 71.

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 13, 1970, and the modified judgment, on a timely petition for rehearing, was entered on April 2, 1970.

The Isbell patent was held invalid in an earlier opinion of the Court of Appeals for the Eighth Circuit, *University of Illinois Foundation* v. *Winegard Co.*, 402 F. 2d 125 (1968). The opinion appears at A. 93. The decision of the District Court for the Southern District of Iowa, 271 F. Supp. 412 (1967), which was affirmed by the Eighth Circuit, appears at A. 101. Certiorari was denied, 394 U. S. 917 (1969).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The federal jurisdiction of the District Court was based on 28 U. S. C. 1338.

The Supreme Court has consistently exercised jurisdiction in cases such as this where a Court of Appeals has sustained an important and dominant patent (which in this case is controlled by the world's largest manufacturer of the patented item), following an earlier holding of invalidity of the same patent by another Court of Appeals. Supreme Court Rule 19(1)(b).

The petition for certiorari herein was seasonably filed following the April 2, 1970 modified judgment of the Court of Appeals for the Seventh Circuit, and was granted on October 19, 1970.

STATUTES AND REGULATIONS INVOLVED.

Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year,

or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282. 15 U. S. C. 2.

Sale, etc. on agreement not to use goods of competitor.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731. 15 U. S. C. 14.

Conditions for patentability; novelty and loss of right to patent.

A person shall be entitled to a patent unless—

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, July 19, 1952, c. 950, § 1, 66 Stat. 797, 35 U. S. C. 102(b).

Conditions for patentability; non-obvious subject matter.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section

102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. July 19, 1952, c. 950, § 1, 66 Stat. 798. 35 U. S. C. 103.

QUESTIONS PRESENTED.

QUESTION 1. Should the holding of *Triplett* v. *Lowell*, 297 U. S. 638, that a determination of patent invalidity is not *res judicata* as against the patentee in subsequent litigation against a different defendant, be adhered to?

QUESTION 2. If not, does the determination of invalidity in the *Winegard* litigation bind the respondents in this case?

QUESTION 3. Is the Isbell patent, purporting to dominate the present-day home television receiving antenna field, valid, as held by the Court of Appeals for the Seventh Circuit in this cause; or is that patent invalid, as held a short time earlier by the Court of Appeals for the Eighth Circuit in the *Winegard* case, following the latest pronouncements of the Supreme Court regarding patentability?

QUESTION 4. Has a patentee (University of Illinois Foundation) any standing in a court of equity where, in the words of the Court of Appeals in this cause, the patentee

> "affirmatively presents a half-truth to the patent office in order to overcome a rejection,"

knowing

> "that the whole truth would support rather than overcome the rejection;"

or does such misconduct in the Patent Office, in line with previous pronouncements of this Supreme Court, but

ignored by the Court of Appeals, bar relief of patent enforcement for unclean hands, and even constitute an antitrust violation, when such improperly obtained patent was used vigorously by the patentee and its exclusive licensee (JFD Electronics Corporation) to restrain competition?

QUESTION 5. Are the requirements upon the District Court for due process in patent litigation and, more particularly, for specific findings underlying the determination of "obviousness" in patent causes, as laid down by the Supreme Court in *Graham* v. *Deere*, 383 U. S. 1 (1966), mandatory or just optional and ignorable, as held by the Court of Appeals in this cause, in conceding that the

> "district court did not describe the scope and content of the prior art, identify the differences between the prior art and claim . . . nor state the level of ordinary skill in the pertinent art"

—in short, made *none* of the findings required by *Graham* v. *Deer* in connection with petitioner's patent asserted against respondents in a counterclaim?

STATEMENT OF THE CASE.

A. Introduction.

The University of Illinois Foundation brought suit for infringement of two of its patents in the home television receiving antenna field (3,210,767, issued October 5, 1965, in the name of D. E. Isbell; and Re. 25,740, reissued March 9, 1965, in the name of P. E. Mayes et al.) against a Chicago customer of a small New Jersey electronics firm, Blonder-Tongue Laboratories, Inc., which had just entered the antenna business. Blonder-Tongue voluntarily subjected itself to the jurisdiction of the Court to defend its customer, and counterclaimed against the University of Illinois Foundation and its exclusive licensee of these

patents, JFD Electronics Corporation. In the counterclaim, Blonder-Tongue Laboratories asserted the invalidity and non-infringement of the Isbell and Mayes et al. patents and complained of unfair competition, antitrust violation and infringement of its own patent by JFD Electronics Corporation and the University of Illinois Foundation.

The petitioner was forced to defend against the Isbell and Mayes et al. patents, through no fault of its own, without the benefit of a single witness of its own on these issues, and in a trial that was earmarked by various deprivals of due process by the District Court.

The District Court found both the Isbell and Mayes et al. patents valid and infringed and dismissed all of petitioner's counterclaims.

On appeal, the Court of Appeals for the Seventh Circuit reversed with regard to the validity of the Mayes et al. patent; reversed by holding that the University of Illinois Foundation had indeed presented half-truths to the Patent Office; sustained the finding of validity of the Isbell patent; and sustained also the dismissal of petitioner's counterclaims.

B. As to Question 3 (Isbell Patent).

In sustaining the Isbell patent, which purports to be the dominant patent in the home television receiving antenna field today, the Court of Appeals for the Seventh Circuit frankly states that it has made its decision in direct conflict with the earlier decision of the Court of Appeals for the Eighth Circuit (*Winegard, supra*), finding the Isbell patent invalid.

The main issue of disagreement between the two Courts of Appeals in applying the same prior art to this patent rests on the issue of the standard for "obviousness" of

invention, reiterated by this Supreme Court recently in *Graham* v. *John Deere Co., supra.*

When it is reflected that petitioner was only able to produce documentary material from the *Winegard* suit in opposition to the University of Illinois Foundation's main patent case—as a result of being forced to trial after repeated postponements and at a time just after Christmas when it could not reassemble any of its witnesses—it will be observed that the Court of Appeals for the Seventh Circuit has reached what it calls a "different result" from that reached by the Court of Appeals for the Eighth Circuit, on the *same* prior art evidence. However, this "different result", a finding of non-obviousness, was reached in the face of the denial of petitioner's right to testimony regarding the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the art.

Petitioner asserts invalidity of the Isbell patent on prior art and on the ground that the claimed subject matter was disclosed in a printed publication more than a year prior to the filing date of the application for patent, 35 U. S. C. 102(b). This defense was not relied on by the District Court or the Court of Appeals in the *Wingard* case. Lack of infringement and unenforceability are also urged.

C. As to Question 4 (Fraud, Unfair Competition and Antitrust).

The Court of Appeals, in overruling the District Court, found deception in the procurement of the Mayes patent which was prosecuted together with the Isbell patent, with both the Isbell and Mayes so-called inventions involved in the fraudulent affidavit filed with the Patent Office.

The Court of Appeals declined even to comment, however, upon petitioner's demonstration that such conduct

should have denied any relief to the plaintiff for unclean hands; and since these patents, promptly upon their issuance, were then used in widespread threats and coercion in the market place, antitrust violation appeared evident.

The Court of Appeals similarly gave only casual treatment to other acts of unfair competition, failing even to mention the deliberate interference with the conduct of the trial by the action of JFD in hiring away, during preparation for trial, petitioner's key witness in connection with the unfair competition and antitrust aspects, all of whose records mysteriously disappeared when he left. The lower courts also failed even to comment upon the propriety of JFD's hiring away the co-inventor of your petitioner's counterclaim patent just before the trial, under circumstances where that co-inventor was in possession of the information concerning the infringement by JFD of petitioner's patent.

D. As to Question 5 (Petitioner's Blonder-Schenfeld Patent).

Neither the District Court nor the Court of Appeals made a single finding out of the list of specific findings that this Supreme Court set forth in *Graham* v. *John Deere Co., supra,* as necessary to apply the standard of "obviousness" under Section 103 of the Patent Statute.

This is altogether apart from the deprival of petitioner, through no fault of its own, of its right to expert testimony in connection with presenting its own patent counterclaim.

SUMMARY OF ARGUMENT.

Question No. 1 (re Triplett v. Lowell).

Petitioner not only considers that *Triplett* v. *Lowell* should *not* be overruled, but considers the doctrine of this case to be one of the primary safeguards for justice for patentees in the present difficult and inadequate system of judicial review under the patent laws.

Question No. 2.

In view of our answer to Question 1, no answer is here required.

Question No. 3 (re Isbell Patent).

Despite the denial of due process to petitioner in forcing it to defend plaintiff's suit on the Isbell patent without the benefit of any of its intended witnesses, petitioner was able to introduce into the record the same prior art patents and publications considered in the Eighth Circuit in the *Winegard* case, *supra,* clearly showing invalidity for obviousness.

In addition, petitioner has produced a contemporaneous report showing that, as of the time that Isbell proposed his so-called invention, those in his own university laboratory found "predictable" the design of "multi-element log periodic antennas".

Further, petitioner introduced the DuHamel patent, 3,079,602, and a model of the same which, together with admissions on cross-examination of DuHamel, show complete anticipation of the Isbell claims.

Similarly, admissions on cross-examination of plaintiff's expert, Harris, show complete anticipation of the Isbell claims by a prior "KO" antenna.

In addition, a Quarterly Report No. 2 completely describing the Isbell invention, was available as a published document in a library more than a year before the filing date of the Isbell patent, in contravention of 35 U. S. C. 102b.

And even were the Isbell patent valid, the deliberate two-plane structure of petitioner's antennas comes outside the scope of the substantial coplanar constructions of the Isbell claims, with petitioner's antennas being inoperable if adjusted to be "substantially coplanar" as taught and claimed by Isbell.

Lastly, the Isbell patent would in any event be unenforceable against petitioner because of plaintiff's inequitable conduct.

Question No. 4 (re Fraud, Unfair Competition and Antitrust).

The Court of Appeals has overruled the District Court, finding deception before the Patent Office in the obtaining of the Mayes et al. patent.

Since both the Isbell and Mayes et al. patent applications were prosecuted together and both inventions were involved in the misleading affidavit before the Patent Office which the Court of Appeals found "affirmatively presents a half-truth", all relief should have been denied plaintiff for unclean hands; and since these patents, promptly upon issuance, were used for threats and coercion by the exclusive licensee, JFD, in cooperation with the plaintiff, antitrust violations appear an inescapable conclusion.

A series or pattern of acts ignored as a pattern by both the District Court and the Court of Appeals, have been proven, involving tie-in sales, hiring away of witnesses with special information for this litigation, fraud in the Patent Office and in subsequent misrepresentations of patent scope and coverage in advertising, patent mismarking, improper

news releases, and deliberately false advertising making claims under the aura of the University of Illinois sponsorship to discredit the technical capability of competitive products.

Though the proofs are not copious, this has been shown to be in part because of the hiring away of petitioner's witnesses and employees during this litigation by JFD, and with them the sudden disappearance of such documentary evidence—all the more significant when no specific defense to petitioner's proofs was offered in the court room.

Question No. 5 (re Petitioner's Blonder-Schenfeld Patent).

Neither the District Court nor the Court of Appeals made a single one of the findings required by this Supreme Court in *Graham* v. *John Deere Co., supra,* in summarily dismissing this patent as "obvious".

Apart from this, the legal conclusion as to "obviousness", predicated on the necessary combination of fifteen pieces of prior art is patently in error—the requirement for such a massive number of references, in combination, proving, rather, lack of obviousness and hardly overcoming the statutory presumption of validity.

ARGUMENT.

QUESTION 1.

(Re Triplett v. Lowell)

This Court *sua sponte* has requested argument as to this question presumably since, if the doctrine of *Triplett* v. *Lowell,* 297 U. S. 638, were to be overruled, then in view of the earlier finding of invalidity of the Isbell patent in the *Winegard* litigation, this issue might be foreclosed to the patentee in this cause.

Though petitioners stand to gain by any such result, we cannot urge the destruction of a long-accepted safeguard for patentees merely for the expediency of victory.

In the first place, as pointed out by the Supreme Court in *Triplett* v. *Lowell,* the right of a patentee to retest his patent against another defendant, in good faith and in the conviction of miscarriage of justice, did not originate with that decision. The recognition of that right at least dates back to the late 1800's with the *Barbed Wire Patents* case (143 U. S. 275), and it has been specifically reaffirmed by the Supreme Court in case after case, as indicated in *Triplett* v. *Lowell,* and subsequently thereto.

More than this, consistently in this century, Congress has rejected suggestions to overrule this principle, the latest of which rejections occurred within the past few years following a recommendation of a Presidential Commission. We do not belabor this history further because it is our understanding that others will present these details.

Suffice it to state that we decline to be a party to the concept that the Supreme Court has any justifiable authority

to legislate by overturning its consistent prior decisions that have been deliberately allowed to stand with approval by the Congress over many decades.

Secondly, we are unprepared to urge the modification of established doctrines, such as *res judicata,* merely for the convenience of placing another tool in the hands of patent busters.

Thirdly, our rather extensive experience in trying cases in the present generation of district courts throughout the land brings us to the sincere conviction that nothing but injustice can be wrought by abolishing the safeguards of *Triplett* v. *Lowell.*

A very excellent example of this is evident in the present case where, as will be seen from a discussion of Question 5, the District Court violated every requirement laid down by this Supreme Court for specific findings to be made in connection with the test of obviousness in patent causes, and summarily threw out petitioner's counterclaim patent with a mere fiat that it was obvious in the light of some unexplained combination of the teachings of fifteen different pieces of unexplained prior art.

This shameful treatment was met with equally callous review in the Court of Appeals; and except for the unique circumstances that this case involved a conflict of decisions on another patent, the Supreme Court would never have reviewed this action in connection with your petitioner's patent, judging from the record of certiorari denials over the past generation.

Without the safeguard of *Triplett* v. *Lowell,* and absent certiorari in this cause, petitioner would have been improperly deprived of its patent without any redress.

A second example resides in the experiences of petitioner's counsel in connection with the Pierce cases, where one of the greatest inventions in the field of radio was held

valid in one District Court (*Pierce* v. *American Communications Company, Inc.*, 1953 D. C. Mass., 111 F. Supp. 181) and then was held to be unenforceable, though valid, on a brand new principle of law evolved by the Court of Appeals for the First Circuit, *American Communications Company* v. *Pierce*, 1953, 1 Cir., 208 F. 2d 763, cert. denied, 347 U. S. 944, reh. denied, 347 U. S. 970, 348 U. S. 851.

Triplett v. *Lowell*, however, was still the law, and so Professor Pierce became enabled to try again, this time in the Third Circuit. But the Court of Appeals for the Third Circuit also ruled against him, *Pierce* v. *Allen B. DuMont Laboratories, Inc.*, 1961, 3 Cir., 297 F. 2d 323. This ruling however, did not adopt the position of the Court of Appeals for the First Circuit that the patent was valid, but unenforceable, but it evolved a brand new principle of patent law that the patent was valid only up to a certain date and then became invalid.

The inventor thus became deprived of the fruits of his invention in both the First and Third Circuits, but for two entirely different reasons, both unique in the law of patents and both laid down for the first time in two opinions that have never been reviewed by this Supreme Court.

But *Triplett* v. *Lowell* was still in force, so that Professor Pierce could try a third time, this time in the Fifth Circuit.

And the Court of Appeals for the Fifth Circuit, in full knowledge of and in complete disagreement with the adverse rulings of the Courts of Appeals for the First and Third Circuits, refused to follow either of these rulings and held the patent valid and enforceable, *Pierce* v. *Aeronautical Communications Equipment, Inc.*, 1962, 5 Cir., 307 F. 2d 790, cert. denied 371 U. S. 954.

This event illustrates that not only is the doctrine of *Triplett* v. *Lowell* necessary to protect patentees from lack of due process, as in petitioner's case, but it provides that

opportunity to get different interpretations of difficult and unsettled points of patent law on which trained lawyers may disagree, and which justice requires, particularly in view of the impossibility of this Supreme Court reviewing any appreciable number of patent cases.

There is still a further type of experience that the active patent trial practitioner endures in today's courts, however, that points out a further necessity for the safeguards of *Triplett* v. *Lowell.* This resides in the perhaps unpleasant, but none-the-less true, fact that many lay judges do not have the ability to comprehend some of the more technical intricacies of sophisticated technology patents. A classic example in the experience of your petitioner's counsel is *Nyyssonen* v. *Bendix Corporation,* 137 U. S. P. Q. 853, 860; C. A., 1 Cir., 342 F. 2d 531; cert. denied, 328 U. S. 847, reh. denied, 382 U. S. 934.

In that case, the District Court frankly conceded that it just could not understand the technology and just adopted the findings of one side, in desperation. The Court of Appeals stated it could not understand the technology sufficiently to determine whether the District Court's finding of invalidity was or was not erroneous.

Without *Triplett* v. *Lowell,* the creative benefactors of our society, both individual and corporate, would thus be deprived of that measure of fair play and justice that the Constitution guarantees in speaking of *securing* to inventors the rights to their discoveries.

This is altogether apart from the frankly expressed passions of certain courts to destroy patents, as so ably stated by the late Justice Jackson in *Jungersen* v. *Ostby and Barton Company,* 335 U. S. 560, 572, pointing out that

> "the only patent that is valid is one which this Court has not been able to get its hands on."

Lest this Supreme Court labor under a popular misconception that all patentees are the big corporations and that the patent system really only serves the purposes of concentrated industrial power, we invite attention to the chart annexed to this brief (Addendum I) which shows that the individual inventor and the small company inventor today, even in the face of massive government and industrial research and development, produce a large 40% of all current patentable inventions.

It is more particularly in the interest of justice for this sector of the patent community, which produces an inordinately large percentage of the more important current break-through inventions,* that we urge the Supreme Court to adhere to the safeguards of *Triplett* v. *Lowell*, so essential in the imperfect but struggling system of justice that we attempt to administer in today's America.

QUESTION 2.

In view of our answer to Question 1, no answer is required here.

QUESTION 3.

(Re Isbell Patent)

In this case, in sustaining the Isbell patent, which purports to be the dominant patent in the home television receiving antenna field today, the Court of Appeals for the Seventh Circuit frankly states that it has made its decision in direct conflict with the earlier decision of the Court of Appeals for the Eighth Circuit *(Winegard, supra)*, finding the Isbell patent invalid.

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* John Jewkes et al., *The Sources of Invention*, MacMillan, 1959; R. H. Rines, *Create or Perish, The Case for Inventions and Patents*, Academy of Applied Science (permission M. I. T. Press), Acropolis Press, 1964, 1969, p. 45, 102-108; Victor McElheney, *Giant Firms Bested by Lone Inventors*, Boston Globe, p. 60, Feb. 21, 1967.

The main issue of disagreement between the two Courts of Appeals in applying the same prior art to this patent rests on the issue of the standard for "obviousness" of invention, reiterated by this Supreme Court recently in *Graham* v. *John Deere Co., supra.*

When it is reflected that petitioner was only able to produce documentary material from the *Winegard* suit in opposition to the University of Illinois Foundation's main patent case—as a result of being forced to trial after repeated postponements and at a time just after Christmas when it could not reassemble any of its witnesses—it will be observed that the Court of Appeals for the Seventh Circuit has reached what it calls a "different result" from that reached by the Court of Appeals for the Eighth Circuit, on the *same* prior art evidence. However, this "different result", a finding of non-obviousness, was reached in the face of the denial of petitioner's right to testimony regarding the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the art.

Before delving into this question of "obviousness", your petitioner must explain how it happens that so little different documentary evidence appeared in this case from what had previously been considered in the *Winegard* case—this reflecting on the question of due process underlying the defense against the Isbell patent and in the proofs in support of your petitioner's counterclaims, more particularly raised in Question 5.

A. Petitioner Was Deprived of Due Process at the Trial.

It is an unpleasant task for counsel to have to complain of a deliberate deprival of due process by an able trial judge, not to speak of continued hostility and lack of judicial demeanor.

The record shows, however, that Blonder-Tongue was forced to go to trial the second day after Christmas after seven postponements by the Court of successive trial dates, including a postponement of a trial date set for as late as December 18th, for which petitioner was prepared in terms of the availability of its Boston trial counsel, its Cambridge, Massachusetts technical professorial patent expert, who had been working on this case for over a year in preparation for trial, principal witnesses from Blonder-Tongue in New Jersey, as well as witnesses from all over the country who had been prepared to testify more particularly in connection with the unfair competition and antitrust aspects of the counterclaim in this cause (A. 125-132).

Showings were made under oath (A. 135-139) that the postponement of the December 18, 1967 trial date by the Court, and the inability of the Court then to state when or if there would be a trial, even as late as December 20, made it impossible for Blonder-Tongue's business executives in New Jersey, its patent expert in Cambridge, Massachusetts, and numerous other witnesses around the country, to postpone their Christmas and New Year's plans any longer, not just in connection with personal and family matters, but in connection with repeatedly postponed business and professional activities in this country and abroad. The record shows that the Boston counsel succeeded in holding the patent expert, Professor Lan Jen Chu of the Massachusetts Institute of Technology, for the December 18th trial date; but that when no firm substitute trial date could be set, Dr. Chu had to leave for Taiwan for a few weeks' mission that simply could not be postponed longer. The record further shows that other witnesses similarly had to go to different parts of the country and Canada on long-postponed professional and business activities when no firm date could be given immediately following the postponement of the December 18th trial date.

The record further shows that when the Court set the second day after Christmas for the trial date, Boston counsel tried desperately to get the return of Professor Chu for the patent trial, and the presence of the other witnesses; but was unable to do so (A. 138-9).

Counsel's respectful explanation to the Court with a request for just a thirty-day delay to try to get the witnesses together again from abroad and all over the country was rudely dismissed with abuse heaped upon both Boston and local counsel for even intimating that the Court would be "depriving anybody of due process" if Blonder-Tongue were forced to go to trial without its patent expert, let alone any of its other witnesses (A. 144-147).

The record further shows that throughout the presentation of the Foundation's patent infringement case, Blonder-Tongue was deprived of expert testimony and, in fact, testimony of *any* of its own witnesses at all, as a result of being forced to trial under these circumstances.

When it is reflected that the whole decision with regard to patent validity herein turns on the matter of the significance of the prior art and the obviousness of any differences therefrom in the patented structures, the grievous and prejudicial damage to Blonder-Tongue by depriving it, through no fault of its own, of its patent expert and other testimony, both to defend against the patent suit of the Foundation and to conduct its own patent counterclaim—in short, its day in court—is patently evident.

The Court of Appeals dismissed this position on what was apparently a very superficial study of the record, stating that

> "Mr. Blonder did testify. Professor Chu (who had gone to Taiwan in late December) did not, but counsel has not shown the substance of testimony expected from him and not otherwise available."

In the first place, Mr. Blonder was *not* present and did *not* testify during the complete case-in-chief of the University of Illinois Foundation; and petitioner did *not* have *any* witness of any type available to show the scope and content of the prior art, the level of skill or knowledge of the ordinary worker in the art, the lack of existence of any problem to be solved, and the other elements showing obviousness of invention and anticipation.

The record decidedly shows that the substance of testimony expected from Professor Chu was explained; namely, the above-mentioned matters, elementary to defending a patent suit. In the first motion to reschedule the trial, an affidavit of counsel was filed (A. 135) explaining that as to the issues raised in the answer of "invalidity and non-infringement", that

> "Evidence on behalf of defendant with regard to the technical aspects of the litigation will be presented by Dr. Lan Jen Chu, one of the foremost antenna authorities in the world."

It was explained that Mr. Blonder was to testify regarding Blonder-Tongue's antennas and that he and "Other witnesses from scattered points throughout the country will testify regarding the unfair competition and antitrust."

In a supplemental affidavit in support of the motion (A. 137-9), it was further explained that Professor Chu was the "technical expert" of the defendant, that he had "pre-eminent knowledge in the antenna art involved in this litigation" and had engaged in "copious preparation for this trial" and that

> "counsel for Defendant . . . (is) . . . at a serious disadvantage in being forced to trial without having technical counsel during the presentation of Plaintiff's case in order to object to relevance, materiality and other matters, including testimony inconsistent with the depositions, and more particularly as to cross-examination."

More than this, it was explained that in connection with trying to prove the defendant's case without Mr. Blonder, counsel

> "presently cannot prove Defendant's case, particularly since counterclaim defendant, JFD, in the midst of this litigation, deliberately hired away co-inventor Schoenfeld from Defendant, such that the latter is now in the opposition camp."

At the oral argument on the motion (A. 145), petitioner's counsel pointed out the

> "two principal witnesses that are required first for the defense of the suit against our client and, second, for our counterclaim, our Professor Chu, who is the technical expert and who has been working with us for a year in the preparation of this case, and, secondly, Mr. Blonder himself, who is a co-inventor of the Blonder patent involved in the counterclaim and the principal witness in the antitrust and unfair competition counterclaim."

Again, in the opening statement, the Court was once more informed (A. 149) of the technical evidence to be offered as defense to the plaintiff's patents, pointing out that petitioner would "endeavor to show your Honor that the subject matter of the claims of the two university patents was fully anticipated by the prior art."

The Court criticized counsel for saying "endeavor", instead of "will" and was again informed that "We pleaded that when we knew we were going to have witnesses, your Honor. I am just hoping I can get my witnesses."

This was met with the kind of hostility that continued throughout this trial:

> "The Court: Well, I am not concerned with that. I don't start these cases. I just listen to them."

Other evidences of outbursts and hostility throughout the trial are contained at A. 167-8, 173, 215-16, 221, R. 725-6.*

In addition to the above, however, the District Court made numerous arbitrary exclusions of evidence and other rulings that were clearly erroneous, without foundation in law, and highly prejudicial to Blonder-Tongue both in matters of defense with regard to the complaint, and offense in the matter of the counterclaim.

In connection with the Foundation's patent counts, moreover, not having any witnesses of its own, Blonder-Tongue called to the stand Dr. Mayes, the purported inventor of the Foundation's own Mayes et al. patent in suit, who was in court; but the District Court even refused to permit perfectly proper questions as to the technical content of Dr. Mayes' own reports, bearing on prior art and on the antenna project of Isbell that Dr. Mayes supervised and that led to the Isbell patent in suit (A. 214-218); refused to permit even questioning as to the technical content of Dr. Mayes' own patent here in suit (A. 222-224); refused to permit the establishment of the adverse nature of the witness, in that he receives income from the licensing by the Foundation of the patents in suit (later elicited, A. 317-19), or any other interest on the part of Dr. Mayes in the subject matter of the suit from which it would be inferred that Mayes was in fact an adverse witness (A. 225-6); and refused Blonder-Tongue even the right to show Dr. Mayes' relationship to JFD (A. 226) that would entitle counsel to lead the witness (A. 228-30).

As another glaring example bearing upon the unfair competition and antitrust counts (and, of course, the general doctrine of unclean hands, as well), one of the pleaded allegations was that JFD, under color of the name of the University of Illinois and its patent license from the Foun-

* "R" designates references to the Appendix to Brief for Defendant, in the Court of Appeals for the Seventh Circuit.

dation, had engaged in a nation-wide advertising campaign involving false technical claims and deprecations of the apparatus of competitors, including Blonder-Tongue, and false patent representations and markings.

Though thus pleaded, and though JFD's counsel admitted in open court that numerous advertisements were JFD's publications, and though offer was made of the testimony of the single witness available, Mr. Isaac S. Blonder, chairman of Blonder-Tongue, to show by first-hand knowledge the falseness of the representations and claims in these advertisements, the District Court arbitrarily refused to permit the introduction in evidence of these admitted publications of JFD (A. 335-341, R. 539-40).

Blonder-Tongue was deprived of a fair trial.

Ordinarily, the remedy in a cause such as this would be the reversal of the District Court and a remand for a new trial.

Despite the fact that petitioner has been deprived of its day in court, however, the District Court has made sufficient fact findings on certain issues, the Court of Appeals has made sufficient findings, and there are sufficient admissions of the Foundation and JFD in the record (much elicited by cross-examination), to support reversing the conclusions of law of the District Court and the Court of Appeals and finding for petitioner, as a matter of law, on each and every count of the complaint and counterclaim.

B. The Matter of "Obviousness".

The District Court did make some findings that agreed with the District Court of the Southern District of Iowa in the *Winegard* case, which had found the Isbell patent invalid as failing to meet the test of unobviousness of 35 U. S. C. 103, *Supra*, p. 3. Specifically, Judge Hoffman found that, *prior* to Isbell,

> "Shortly after 1954, the log-periodic principle of antenna design was developed" (A. 74);

and that all that Isbell contributed was thinning down the prior art thicker dipoles antenna elements to the "straight or simple dipoles used by Isbell" (A. 77) (which straight configuration, however, Judge Hoffman conceded had long preceded Isbell in the "television reception" field, A. 74).

The question is, therefore, whether the Patent Office may grant as many patents as there are different well-known shapes of dipole antenna elements arranged in accordance with the same *old* log-periodic dimensioning.

The District Court and the Court of Appeals were impressed with the fact that, at least at one time, it could not be "predicted" whether all structures so arranged would "operate successfully as a log-periodic antenna" (A. 75); and that Mr. DuHamel (who derives direct royalty income from the Isbell patent licensing program of the Foundation, A. 273) stated he was "surprised" that Isbell's antenna worked (A. 78).

Because of this supposed "unpredictability", the District Court and Court of Appeals concluded that the Isbell invention must be "unobvious".

But the DuHamel testimony with regard to log-periodic antennas that, in the early days, did not work, had nothing to do with the simple linear dipole antennas of Isbell, a form long known in the art and long used in even the same kind of array, as shown, for example, in the Katzin patent reproduced in Judge Stephenson's decision in the *Winegard* suit (A. 120). DuHamel's testimony dealt rather with esoteric shapes of antennas, spirals, cones, horns, ground planes (PX 30, A. 412, R. 308; PX 31, A. 413, 243; PX 32, A. 414, 246; PX 34, A. 415, 247; PX 36, A. 416, 248; PX 37, A. 417, 250; PX 38, A. 418, 251; and PX 51, A. 427, 262).

The only real issue in this case was the obviousness of trying or of using Isbell's type of straight wire antenna structure; and as to this, Dr. Mayes had to concede that most of them operated "satisfactorily" (A. 317).

Thus the whole basis of supposed unpredictability really had nothing to do with the Isbell type of linear antenna elements.

But even at that, "predictability" and "obviousness" are not the same thing in the law, as pointed out by the 8th Circuit Court of Appeals in affirming invalidity of the Isbell patent in the *Winegard* case, *supra*

> "The statutory standard of patentability under Sec. 103 is not 'predictability'. This terminology helps to obscure the true issue of 'nonobviousness.' The valid test relates the subject patent to whether its developments would be obvious to one skilled in the art" (citing Graham v. John Deere Co., 383 U. S. 1, 17). . . . "In other words, the necessity of logical experimentation does not in and of itself negate obviousness." (citations) (A. 96.)

And altogether apart from whether "predictability" and "obviousness" are or are not the same thing, the record in the present suit contains the additional unequivocal admission that, *as of the time of the Isbell proposal to thin down the old log-periodic dipoles* (as distinguished from the earlier period of "unpredictability" referred to by the District Court, A. 75), all log-periodic antennas were actually *then fully and entirely predictable.*

If we look, indeed, into the *contemporary* documentation, the Antenna Laboratory's Quarterly Report No. 1, D. Ex. 7 (A. 496, 213), we find that, prior to Isbell's so-called invention and before he started to investigate his antenna, Dr. Mayes and the scientists at the Laboratory considered that

> "The experimental results which have been obtained

for the multielement log periodic antennas are *found to be predictable . . .*" (p. 2, emphasis added).

And the only distinction from known log periodic designs that Isbell was going to undertake was

"An investigation of log-periodic structures of *thin* linear elements (zero tooth width) is planned" (p. 2, emphasis added).

Thus, the record in this case shows entire predictability and obviousness at the time Isbell made his proposal, demonstrating the invalidity of the Isbell patent.

C. The "Invention" Was Published More Than a Year Before the Isbell Patent Application Filing Date, in Contravention of 35 USC 102b.

The District Court has correctly found (A. 79, 80) that there was a printed report (Quarterly Engineering Report No. 2, D. Ex. 8, A. 500, 213) that:

1. ". . . 'would have anticipated Isbell's invention if it had been published at a sufficiently early date' . . ."
2. "... the report was printed and physically available prior to May 3, 1959, . . ." which was more than one year before the ". . . application for the Isbell patent . . . was filed on May 3, 1960."
3. There was a " ' library' of sorts" in the University of Illinois Electrical Engineering Research Department where "publications, such as the quarterly reports" were kept "for distributing". Such reports were "generally obtained by request from a member of the publications staff."
4. The person "responsible for distributing" these publications was Miss Marjorie Johnson who "testified that the quarterly report involved here was in the publications office [" 'library' of sorts"] on April 30, 1959, and was therefore 'available for distribution upon request on that date' ".

5. "the document . . . had come into the possession of the publications office on April 30, 1959" and there "existed the rather remote possibility that a person knowing of the report might have asked for it *and obtained a copy of it on that date.*" (Emphasis added.)

The District Court, while admitting that

> "If Miss Johnson were truly a librarian and the document had been available in a genuine library, even a very small or a highly specialized library, this court would be compelled by the weight of authority to hold that such availability constituted 'publication' within the meaning of Sec. 102. See e.g. *Hamilton Laboratories, Inc.* v. *Massengill,* 111 F. 2d 584 (6th Cir. 1940),

proceeds to say that this availability in the engineering laboratory " 'library' of sorts" was still, as a matter of law

> "not sufficiently 'public' in nature to constitute the kind of publication intended by the act."

This, however, is clearly an incorrect interpretation of the well-established law.

Apparently the Court of Appeals appreciated that this was a wrong conclusion of law because it undertook not to apply the law to the facts as found by the District Court, but to speculate on its own that "it is unlikely that a copy of the report in question reached the 'library' before May 3" (A. 57).

Note that the Court of Appeals conceded the matter of the existence of a "library"; and it could hardly have done otherwise, particularly since the University itself called it the "Local Library E. E. R. L." (D. Ex. 22, DX H-4, A. 392, R. 289).

Instead of accepting the District Court's findings of fact that the report had reached Miss Johnson on April 30, 1959 and "was physically available prior to May 3,

1959", the Court of Appeals thus engaged in its own speculation that the report might not have reached the "library", and on this ground refused to apply the law. While there is not a great deal of law in the Supreme Court on this matter, there appears to be unanimity in the lower courts as to the consequence of these facts.

The Sixth Circuit Court of Appeals, for example, held in *The Hamilton Laboratories, Inc.* v. *Massengill,* 111 F. 2d 584, 585 (6 Cir., 1940):

> ". . . the Weed thesis is in the prior art and marks a step in its development since it was *put on file in the library of the college,* available to students there and to other libraries having exchange arrangements with Iowa State. John Crossley & Sons v. Hogg, C. C., 83 F. 488, 490; Britton v. White Mfg. Co., C. C., 61 F. 93, 95. *We think intent that the fruits of research be available to the public is determinative of publication under the statute. . . .*" (Emphasis added.)

The sufficiency of the deposit in a library of a single copy of printed matter and the immateriality of the obscurity of the library were commented on by the Court of Customs and Patent Appeals in the case of *In re Tenney, Frank and Knox,* 254 F. 2d 619, 627 (1958). In that case, the Court observed that there was publication even with

> "a printed publication, available to the public only in a Southern Rhodesian library,"

See, also, *Interchemical Corporation* v. *Sinclair & Carroll Co., Inc.,* "A printed publication . . . is anything that is printed and made accessible to any part of the public." 50 F. Supp. 881 at 890 (D. C., N. Y.), reversed 144 F. 2d 842 (2 Cir., 1944); reversed 325 U. S. 327 (1945). Also, *Gulliksen* v. *Halberg* v. *Edgerton* v. *Scott,* 75 USPQ 252 (P. O. Bd. App., 1937), and *Ex parte Hershberger,* 96 USPQ 54 (P. O. Bd. App., 1952).

Still more recently, the District Court for the Southern District of California held that the filing of a copy of a thesis in a college library on October 9, 1950, barred a patent applied for October 30, 1951 (21 days over the permissible one year). *Indiana General Corp.* v. *Lockheed Aircraft Corp.*, 249 F. Supp. 809, 815, 816 (1966), reversed on other grounds 408 F. 2d 294.

Thus the Isbell invention was published more than a year before the Isbell patent application was filed (May 3, 1960), and there is a statutory bar to the Isbell patent, 35 U. S. C. 102b.

On this one ground alone, as a matter of law, the Isbell patent should be declared invalid.

D. The Isbell Patent Is Completely Anticipated by Prior Art.

The Isbell invention, moreover, is clearly anticipated by the disclosure of DuHamel patent 3,079,602, D. Ex. 14, (A. 510, R. 283) not before the courts in the *Winegard* case. DuHamel appeared as a witness for the plaintiff in this cause during the presentation of its case-in-chief—a period when, it will be recalled, petitioner had absolutely no witnesses of its own available to it.

In cross examination, however, petitioner was able to elicit from DuHamel that an antenna model, D. Ex. 24 (R. 472), was a correct representation of Fig. 5 of his patent (A. 287, 511).

During the argument before the Supreme Court, it will be visually shown that this DuHamel antenna configuration, D. Ex. 24 (R. 472), anticipates completely the Isbell structure with the one exception that the dipoles are triangular loops instead of straight wires. All of the rest of the log periodic length and spacing dimensions and electrical feed

and performance specified in the Isbell claims are fully met by this structure.

Mr. Harris, another witness for plaintiff, on cross-examination (A. 171), conceded that these triangular loop dipoles and the thinner wire or cylindrical dipoles of Isbell were both old and well-known dipole antennas prior to Isbell's invention; and that their performance, operation, and current distributions were similar (D. Ex. 2, item 6, A. 476, R. 236; and D. Ex. 1, item 1, A. 475, R. 235; A. 181-83, 191-92).

Certainly, DuHamel's antenna of his Fig. 5 thus constituted an anticipation of Isbell's structure, particularly since the Isbell claims broadly refer to "dipoles", and do *not exclude* DuHamel's well-known dipoles.

Even more, however, DuHamel taught making his dipoles of any variable "width" (col. 3, line 15, A. 520), thus teaching every single element of Isbell's alleged invention. Dr. DuHamel, indeed, conceded that at least the outer regions of his dipole elements of Fig. 5 were of substantially zero width (A. 286).

Obviously a valid patent cannot be granted for each old and well-known type of dipole that is substituted in the same old antenna array configuration.

E. The Isbell Patent, Even Were It Valid, Is Not Infringed by the Blonder-Tongue Structures.

Both the District Court and the Court of Appeals agreed that the Blonder-Tongue antennas are not constructed with the antenna elements in the same plane, but have the elements, rather, in two vertically spaced planes.

While finding that the Isbell and Mayes et al. patents teach only a "substantially planar, parallel arrangement" (A. 75) and that, contrary to those coplanar teachings, the

Blonder-Tongue antennas have a deliberate "separation in the planar arrangement", the District Court gratuitously extended the monopoly of the Isbell patent and construed this as "substantially coplanar" and within the claims of the patents (A. 84).

The Court of Appeals, however, could only sustain this position on a ground that it imagined for itself; namely, that it was not physically possible for petitioner to build the structure with antennas actually substantially in one plane, so that the Blonder-Tongue antennas, though in two planes, infringe upon the Isbell "coplanar" claims. In the precise words (A. 68) of the Court of Appeals

> "Apparently it is difficult or impossible to construct the Isbell antenna (or similar arrays with two transmission lines) so that all dipole elements lie exactly within one plane. The Isbell patent states that the dipoles are 'substantially coplanar'."

In its original decision, the Court of Appeals was under the impression that all the Blonder-Tongue antennas were spaced only an inch apart and, therefore, put that fact in the decision (A. 68), thus reaching the conclusion that Blonder-Tongue's antenna was, therefore, "substantially coplanar".

When it was called to the attention of the Court of Appeals that the Blonder-Tongue Ranger antennas, for example, had the planes *four* inches apart, clearly having nothing whatever to do with the problem of any difficulty or impossibility in close construction, instead of correcting itself, the Court of Appeals merely took the reference to the inch dimension out of its decision.

At the hearing of this case before the Supreme Court, petitioner's counsel will visually show these antennas, so that it will be immediately evident that there is no relationship between the actual spacing between the planes thereof

and any problem in not being able physically to construct the antenna with a closer positioning of the various antenna elements.

This will show the spuriousness of the holding that these antennas can possibly be construed to fall within the "substantially coplanar" limitations of the Isbell claims.

Clearly, if Isbell had been entitled to a claim covering any substantial separation of planes of antennas, none of its skilled attorneys, the patent applicant or the Patent Office would have permitted or required a limitation in the claims to "substantially coplanar".

Indeed, the Patent Office itself allowed the Blonder-Schenfeld patent of your petitioner over the precise teachings of the Isbell patent (D. Ex. 26, A. 525, R. 477, col. 4, line 54), and with this deliberate spacing of planes as one of the vitally different constructional and operational features.

More than this, Dr. Mayes, on cross-examination, admitted during the trial of your petitioner's patent (A. 316), that if the Blonder-Tongue antenna booms were made substantially coplanar, the antenna would no longer operate properly.

> "Q. Dr. Mayes, if the two booms of the Blonder-Tongue Dart antenna, Plaintiff's Exhibit 10, are moved together so that they are substantially in the same plane, very close, very small separation as compared with the three-quarters of an inch, will there not be a serious mismatch between this antenna and the 300 ohm transmission line feeding it over the UHF band?
>
> • • • • •
>
> "The Witness: Yes.
>
> "By Mr. Rines:
>
> "Q. Will this not result in a serious deterioration of the gain or figure of merit of the antenna?
>
> "A. Yes."

A basic principle of patent law is that for infringement there must be identity of means, operation and result.

The District Court was unwarranted, as a matter of law, in reading *out* of the Isbell patent claims the specific requirement for a *coplanar* construction, without which limitation these patent claims would not have been granted—a construction deliberately not employed in the Blonder-Tongue antennas and, indeed, entirely *unemployable* for satisfactory operation of the same; a fact which the Patent Office itself recognized in holding the Blonder-Tongue antenna an unobvious departure from the work of Isbell in granting the Blonder and Schenfeld patent, D. Ex. 26 (A. 525, R. 477).

It is elementary that a device that cannot work in accordance with a patent claim cannot possibly be an infringement thereof.

Finally, it will be shown that the structure of the DuHamel antenna, D. Ex. 24 (R. 472) is of much less separation between the planes of antennas than the Blonder-Tongue Dart antenna, and is of much smaller separation than the four inches involved in the Blonder-Tongue Ranger antennas. Plaintiff's own witness, Mr. Harris, conceded that the DuHamel structure was *not* coplanar (A. 186-7). This was also positively stated by DuHamel himself (A. 292).

If the DuHamel structure is not "coplanar" then, of course, clearly neither of the Blonder-Tongue antenna structures is coplanar and the Isbell patent is clearly not infringed.

Even though deprived of expert testimony to which it was entitled, petitioner believes that it has proven, as a matter of law, that the Isbell patent is not infringed by the Blonder-Tongue antennas, even were the patent valid, which it is not.

F. Even Were It Valid, the Isbell Patent Is Unenforceable Against Petitioner.

The unclean hands of the plaintiff, not only in connection with deceit in the Patent Office, but unfair competition and anti-trust violations in the market place together with the counterclaim defendant JFD, should, under well-established authority set forth later in connection with Question 4, bar enforcement of the Isbell patent against petitioner, even assuming such patent were valid and infringed, which it is not.

G. Conclusion as to the Isbell Patent.

Though deprived of its day in court, and its right to present witnesses, and through them evidence of prior art and the various elements of obviousness of invention and non-infringement, including the deprival of the right to examine on direct examination, let alone cross-examination, the plaintiff's patentee, Mayes, concerning the Isbell and Mayes patents in suit, petitioner did succeed in getting into the record the following:

1. The same prior art patents and publications considered by the District Court and the Court of Appeals for the Eighth Circuit in connection with the *Winegard* litigation, from which the conclusion was reached that the Isbell patent was invalid for obviousness—a conclusion that is also here urged on the same reasoning;

2. A contemporaneous report from the University of Illinois laboratory of Isbell and Mayes at the time that Isbell was first proposing to modify prior art log periodic antennas by reducing the width of the antenna elements to nearly zero so that they were straight tube or wire dipoles, which admits that, as of *that* late date, as distinguished from earlier times, the "multi-element log-periodic antennas are *found to be* predictable"

(Quarterly Report No. 1, D. Ex. 7, A. 496, 213, page 2, emphasis added);

3. The prior art DuHamel patent 3,079,602 (D. Ex. 14, A. 510, R. 283) together with cross-examination of DuHamel not before the Eighth Circuit, in which it is admitted that the antenna model D. Ex. 24 (R. 472) is a correct representative of Fig. 5 of that patent (A. 511), shows the identical type of antenna array taught by Isbell, but with the DuHamel triangular loop dipoles instead of standard straight dipoles—this being coupled with cross-examination of plaintiff's expert, Mr. Harris, also not before the Eighth Circuit, admitting that these triangular dipoles and the thinner straight dipoles of Isbell were both old and well known prior to Isbell's so-called invention (A. 171) and that their performance, operation and current distribution were similar (D. Ex. 2, Item 6, A. 476, R. 236; and D. Ex. 1, Item 1, A. 475, R. 235; A. 181-83, 191-2);

4. The Isbell patent claims refer broadly to "dipoles"; they do *not* exclude DuHamel's "dipoles"; and thus they read directly on the evidence of item 3;

5. The "KO" antenna of Channel Master (D. Ex. 4, A. 481, R. 237), which was admitted to be in public use more than a year before the filing of the Isbell patent application (A. 181) and which is an identical structure except that the dipoles are of the so-called rectangular loop or folded type instead of the straight single rods of Isbell—and which folded dipoles plaintiff's witness, Mr. Harris, conceded had similar performance, operation and current distribution to those of Isbell (D. Ex. 2, Item 7, A. 476, R. 236; A. 191-92) —it being further significant that there is not a single word in the Isbell patent specification or in a single claim thereof that excludes folded dipoles;

6. Antenna Laboratory Quarterly Report No. 2, D. Ex. 8, A. 500, 213 that admittedly completely described the so-called Isbell invention, and that the District Court conceded was available at a local library of the University of Illinois on April 30, 1959, more than a year before the filing date of the Isbell patent, in contravention of 35 U. S. C. 102b;

7. Evidence that even were the Isbell patent valid, the Blonder-Tongue antennas are constructed deliberately not to be "substantially coplanar" and, indeed, will not operate satisfactorily if so adjusted, by the admission of plaintiff's own patentee, Mayes (A. 316); and

8. That for reasons more particularly set forth in the subsequent discussion of Question 5, the Isbell patent would in any event be unenforceable because of inequitable conduct.

It appears, moreover, that the plaintiff's case in connection with the Isbell patent should properly have been dismissed on petitioner's motion to dismiss following the presentation of the plaintiff's case-in-chief.

In support of that motion, it was pointed out (A. 196-207) that neither the Court nor defendant had been apprised in the so-called *prima facie* proofs of a single claim of the Isbell patent that was alleged to have been infringed; that the District Court was not supplied with any technical explanation of the meaning of much of the scientific terminology used in the patent and in the claims; and that, apart from a generalization or conclusion of plaintiff's expert, Harris, that structural elements of the patents (*not* the actual elements of the *claims*) existed in the petitioner's antennas, there was no testimony or explanation of any underlying facts necessary to establish the meeting of the terms of the claims by the petitioner's antennas.

It had heretofore been the law in the Seventh Circuit, as elsewhere in the United States (*Briggs* v. *M. & J. Diesel Locomotive Filter Corp.*, 228 F. Supp. 26, 48-9 (D. C. N. D. Ill. 1964), aff'd 342 F. 2d 573 (1965), cert. denied 383 U. S. 801) that, in technical cases, the courts cannot engage in guess work or attempt to decipher technical language for themselves; and certainly cannot guess as to what claims might or might not be asserted as infringed or how they might read on the allegedly infringing structures.

Plaintiff's *prima facie* case contained no establishment that the language of a single claim found response in the accused devices.

It was not until the plaintiff's brief after trial that plaintiff even identified what claims were allegedly infringed and purported for the first time to show, in the language of the *Briggs* case, *supra*, that the "words of the claims find a response in the accused device".

But failure to prove a *prima facie* case cannot be cured by a brief after trial, and such brief cannot be used to establish underlying facts or evidence. Nor can a brief be used to rectify the failure of plaintiff to produce a record that explains the meaning of technical words of the claims, particularly in technical fields where, as previously conceded by the Court of Appeals for the Seventh Circuit itself in *Technograph Printed Circuits* v. *Methode Electronics Inc.*, 356 F. 2d 442, 448 (1966):

> "... the patents in suit ... are of such technical nature as to escape our understanding. They may 'speak for themselves' but we feel the need of expert translation and interpretation, screened for us by appearance and demonstration before a trial court."

The motion to dismiss should thus have been granted.

QUESTION 4.

(Re Fraud, Unfair Competition and Antitrust.)

The University of Illinois Foundation simultaneously prosecuted the patent applications for the Isbell patent and the Mayes et al. patent here in suit. In fact, Mayes was in the same university laboratory as Isbell, and the same attorneys handled the prosecution of the two patent applications.

The patent examiner had rejected the Mayes et al. application as not constituting invention over the earlier antenna of Isbell, described in a printed publication.

In order to overcome this rejection, the attorneys prepared, and Mayes executed, an affidavit under Rule 131 of the Patent Office,* swearing that Mayes et al. had made the invention before the publication of this article describing the Isbell antenna.

While the District Court refused to find anything wrong in this prosecution, the Court of Appeals for the Seventh Circuit, in view of the deliberate misrepresentation before the Patent Office, was forced to overrule the District Court in this particular.

> "Neither Mayes nor counsel pointed out the fact, *known to Mayes,* that the Isbell article, with very

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* "*Rule 131. Affidavit of prior invention to overcome cited patent or publication.* (a) When any claim of an application is rejected on reference to a domestic patent which substantially shows or describes but does not claim the rejected invention, or on reference to a foreign patent or to a printed publication, and the applicant shall make oath to facts showing a completion of the invention in this country before the filing date of the application on which the domestic patent issued, or before the date of the foreign patent, or before the date of the printed publication, then the patent or publication cited shall not bar the grant of a patent to the applicant, *unless the date of such* patent or *printed publication be more than one year prior to the date on which the application was filed in this country.*" (Emphasis added.)

> slight revision, had first been published . . . more than one year prior to the filing date", (emphasis added)

and thus that this earlier publication could *not* be sworn back of under Rule 131.

The Court of Appeals characterized this as a case where

> "an applicant affirmatively presents a half-truth to the patent office in order to overcome a rejection when he must know that the whole truth would support rather than overcome the rejection."

From this, the Court of Appeals clearly stated the law that

> "The applicant's knowledge of a fact as to which he knows the patent office is ignorant or mistaken and which would be material under the theory he knows the patent office is applying would impose an obligation of candor."

The Court of Appeals went further and stated that, with regard to the prior publication suppressed by Mayes et al. in this affidavit,

> "It is clear that the publication date . . . would, on the theory followed by the examiner, have prevented issuance of the patent."

Not only did Mayes et al. and his counsel suppress that earlier publication, but they also suppressed still another earlier publication of which they had knowledge, which also would have supported the examiner's rejection. In the words of the Court of Appeals

> "Presumably the same would be true of the publication of Quarterly Report No. 2, May 5, 1959".

Though finding this misconduct before the Patent Office, the Court of Appeals, for some reason that it failed even to mention, ignored the clear requirements of this Supreme Court that patentees who have misrepresented will not be entitled to enforcement. (See, for example, *Hazel-Atlas*

Glass Company v. *Hartford-Empire Co.*, 322 U. S. 238, 246-7 (1944); and *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 805, 818, 819 (1945).)

The *Hartford-Empire* case, moreover, makes plain that equitable principles require denial of relief where the Patent Office has been subjected not only to "fraud", which the Court of Appeals said it was "reluctant" to find,* but for "deception" (page 246), which the Court of Appeals *did* find was practiced

Since both the Isbell and Mayes et al. patent applications were prosecuted together, and both inventions were involved in this affidavit before the Patent Office, which the Court of Appeals found "affirmatively presents a half-truth", the Court of Appeals should have denied any relief to the plaintiff for unclean hands under established equitable doctrines and the clear mandate of the Supreme Court.

More than this, since these patents, promptly upon their issuance, were then used in tremendous advertising campaigns, A. 84-5, and in threats and coercion by the exclusive licensee, JFD Electronics Corporation, the matter of antitrust violation appears an inescapable legal conclusion, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corporation*, 382 U. S. 172 (1965).

Turning to these further violations performed under color of the improperly obtained patents, it should be explained that the District Court made a number of findings from which that Court drew what we consider to be

* The reluctance to use the word "fraud" was apparently based upon the feeling of the Court of Appeals that the Isbell article referenced an earlier publication; but that footnote reference did not state the actual date of *publication* of the report from which the Examiner could have determined a statutory bar. That was known only by Mayes and his counsel, who did not communicate this to the Patent Office.

incorrect legal conclusions; and the Court declined to examine the effect of the totality or scheme or *pattern* of these acts, as distinguished from the individual separate acts themselves, in drawing legal conclusions as to unfair competition and antitrust violation.

While conceding (A. 68, 69) that the District Court could have found oppositely, the Court of Appeals gave this whole issue a mere passing comment without examining a single situation or the total effect of the *pattern* of conduct.

It is thus in order to review these matters because, frankly, it is doubted that there has often been a case wherein so many unfair acts and restraints on competition were practiced in complete disregard, not just of ethics and common decency, but of the legal metes and bounds of proper conduct in the administrative agency (the Patent Office), the market place, and in the very processes of the courts themselves.

A. A Summary of the Unfair Competition and Antitrust Aspects.

Though, as above explained, by being forced to trial without any of its intended customer and other witnesses, Blonder-Tongue was deprived of its right to complete proofs of these counterclaims,* the District Court did make certain findings of fact in connection with that evidence which Blonder-Tongue was able to muster, as through depositions. Based on these findings it is clear that the District Court drew entirely the *wrong* conclusions of law. It appears, indeed, that those findings entitle Blonder-Tongue to a reversal and to judgment, as a matter of law, as to both the counterclaim for unfair competition and the counterclaim for antitrust violation.

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* As before stated, competent, relevant evidence was arbitrarily excluded, p. 20-23, *supra;* R. 666, 7.

First, a brief review of the series of acts that the counterclaim alleges constituted a *pattern* of unfair competition and antitrust violations (A. 13-18, 41-43):

1. A nationwide advertising program in technical, consumer, trade and news publications knowingly falsely representing the scope of patent coverage of the JFD antennas marketed under license from the Foundation, and deliberately or negligently grossly exaggerating the performance thereof. The ads used the names of both the Foundation and the University of Illinois to give color, credence and prestige to the misleading statements as to the patent monopoly of the Foundation and JFD in log periodic television antennas, with the innuendo of threat against any customers who use log periodic antennas of other manufacturers, including Blonder-Tongue.

2. Coupled with this advertising program, there was a campaign of litigation and threatened litigation against numerous manufacturers of log periodic antennas, including Blonder-Tongue. This was accompanied by wide circulation to the trade and to antenna customers, including those of Blonder-Tongue, of news releases of such suits and threats of suits and of newspaper clippings and reprints relating to the same. Suit was brought against Blonder-Tongue in the Northern District of Illinois with the knowledge that there was no jurisdiction, clearly for the purpose of immediately releasing and mailing to Blonder-Tongue's customers and the trade news releases both of JFD and the Foundation which prominently mention the suit against Blonder-Tongue.

3. A campaign of patent mismarking of the JFD antennas licensed by the Foundation, knowing the antennas not to be covered by the patents so marked, and even widely representing falsely that the Foundation patents *actually covered the log periodic formula itself*, with the intent of deceiving the public into thinking that the antennas offered for sale were already protected by patents of the Foundation and that no other manufacturer could lawfully even use the log

periodic formula, thereby to dissuade customers from purchasing log periodic antennas from anyone else, including Blonder-Tongue.

4. Procuring the Mayes et al. patent 3,108,280 (forming the basis of the reissue patent 25,740) by filing in the Patent Office a misleading affidavit, either willfully or through gross negligence, defrauding the Patent Office.

5. Raiding *key* personnel associated with the Blonder-Tongue antenna business and program at times clearly calculated to handicap Blonder-Tongue in collecting and presenting evidence in this trial as well as to prevent Blonder-Tongue from effectively competing as an antenna marketing company.

6. A campaign under the threat of the Foundation patents to force customers to buy unpatented items from JFD and not from Blonder-Tongue and other competitors.

Now to some of the actual findings of the District Court as to these pleaded allegations:

First, the District Court concedes that at least "some of the language employed in JFD advertisements" requires interpretation to give it veracity, including the false statement that the Foundation had patented the "log periodic cellular formula" itself. From this statement, the Court held that a reader could be led, though he "was not *necessarily* led to believe that JFD had patented the whole concept of log-periodicity" (emphasis added). (The Court concluded, however, that this was "not so offensive as to be characterized as 'unfair' "; A. 84.)

Second, the District Court found that suit had knowingly been brought with improper "venue" against Blonder-Tongue, with the intended purpose of issuing throughout "the trade . . . news releases describing the litigation". (The Court found this to be "the right" of the Foundation.)

Third, the District Court found there was actually pat-

ent "mismarking" in addition to the representations above-quoted as to the supposed patenting of the formula itself. (As to this, the Court concluded that "Its effect, if any, was minimal.", A. 85.)

Fourth, the District Court did not dispute that Mayes et al., in filing the affidavit in the Patent Office that induced the Examiner to allow their patent, did not tell the whole truth, as before discussed. The Court found, only, that Mayes et al. "were under no obligation to disclose their knowledge of references". (As to this, the Court concluded there was no misrepresentation, A. 82, and that such action did not constitute "unfair competition", A. 86.) The Court of Appeals reversed this holding and found deception (A. 67).

Fifth, the District Court found, A. 87, that:

> "The record shows that several persons formerly in Blonder-Tongue's employ were subsequently hired by JFD and that, after the departure of one of these, some records dealing with customers were found to be missing."

The Court seemed to have trouble dismissing this as lightly as the other issues, stating, A. 87, that the Court

> "might be tempted to conclude, with Blonder-Tongue, that that company had been (in popular parlance) 'raided' by JFD."

(As to this, however, the Court concluded that since the number of employees so hired away was only a "small fraction" of the turn-over of personnel, that this was not raiding, as a matter of law, A. 87.)

Sixth, the District Court found that Blonder-Tongue had actually produced some evidence "which tends to support this argument" that JFD would "force its customers to purchase its unpatented products as a 'tie-in' with its patented products". (The Court concluded, however, that

since this was "a normal business practice" it was legal, A. 87, 88.)

B. The Legal Significance of Such a Series or Pattern of Activities that the District Court Found Had Existed.

Altogether apart from whether the District Court was or was not correct that, of themselves, each of these six types of activities was permissible and not unfair, or in restraint of competition, the law—ignored by the District Court—is quite clear that the *pattern of such a series of acts can be unfair competition* (and also antitrust violation), even if the acts individually by themselves were nonactionable.

The language used in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, is appropriate:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. . . . Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."

Unfair competition and antitrust often result from the same actions. One commentator expresses it as follows:

> "When, of course, unfair competition has an anticompetitive effect as in restraint of trade or monopoly, the antitrust laws as well as the law against unfair competition are concurrently applicable." Callmann Unfair Competition Trademarks and Monopolies, Third Edition, Sec. 15.1c (Volume 1, p. 287).

C. The Illegality of the Individual Acts Themselves.

But even as to the unfair competition (and antitrust) aspects of the separate or individual acts found by the District Court to have been performed by JFD and the Foundation, the Court erred in the conclusions as to the legal effect of these acts, taken individually.

1. Tie-In Sales.

Turning to the *sixth point* (*i.e., "tie-in" sales*), it is *not* the law, as stated by the District Court, that because this may or may not be "a normal business practice", it is legal. To the contrary, the law is well-established that where salesmen have a patented line, and, as the Court has here found, try to force the sale of their other nonpatented products with this as a wedge, this is not only a misuse of patents, barring relief for patent infringement, but decidedly unfair competition and in restraint of competition in violation of Section 3 of the Clayton Act (15 USC 14).

This was recently reiterated, for example, in *Preformed Line Products Company* v. *Fanner Manufacturing Co.*, 225 F. Supp. 762 (D. C. N. D. Ohio 1960), Aff'd 328 F. 2d 265 (6 Cir. 1964), cert. den. 379 U. S. 846,

> "restraining competition in unpatented or licensed armor rods by tying the purchase of such devices to the purchase of the patented dead ends."

The quoted testimony in the *Preformed Line Products Company* case, indeed, closely parallels that elicited on deposition prior to trial from JFD Vice President Finkel in this case. A transcript of the deposition is in evidence as D. Ex. 42, R. 515. On page 73, Mr. Finkel conceded that petitioner and JFD have competitive lines of converters and amplifiers that are used with antennas in receiving systems:

> "Q. Was it the fact, to your knowledge, that Blonder-Tongue Laboratories had a competitive line of converters and amplifiers?
> "A. Yes, of course."

Mr. Finkel also conceded that JFD's converters and amplifiers are *not* covered by patents, pp. 75-6:*

> "On the existing line, no."

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* Page references are to the deposition transcript.

Mr. Finkel further admitted, pp. 73-4, that JFD's salesmen and distributors stress that the JFD antennas

> "are covered by patents of the University of Illinois Foundation",

and that JFD is

> "the exclusive licensee under those patents."

As part of what Mr. Finkel characterized as the "normal selling" by JFD salesmen and distributors, he conceded that they also might make statements to a potential customer that if such customer

> "handled anyone else's line of log periodic antennas, they would be sued."

And further as to this "normal selling" of stressing the antenna patents and the possibility of suit, he frankly conceded that JFD salesmen try to tie in the non-patented converters and amplifiers of JFD, as well (pp. 74-5):

> "Q. And would you acknowledge that in connection with this normal selling they at the same time tried to persuade the customer to handle your antennas and your line of converters and boosters?
>
> "A. Our salesmen are always trying to sell all of our accessory merchandise along with our antennas . . .
>
> • • • • •
>
> "Q. Do you know in connection with these customers that handle your entire line, whether the distributors tried to persuade the customers to handle *only the JFD line of products and not those of the competitor?*
>
> "A. You are talking of distributors persuading dealers when you say customers?
>
> "Q. Yes.
>
> "A. This, again, is par for the course, because all distributors are trying to get the dealer convinced that the product they are selling is better than anybody else's.
>
> "Q. So it is conventional for them to say, to try to

. . get the dealers to handle *only JFD antennas, converters, boosters?*

"A. They try, but too few succeed."

Under mention of the antenna patents and threat of suit if the dealer handles anyone else's log periodic antenna, thus, JFD admittedly tries to get customers to purchase its unpatented converters and amplifiers to the exclusion of competition.

This practice was also verified by the deposition of Mr. Helhoski, who testified that he received reports that customers received the implication from JFD that JFD would not sell its patented antennas to those who did not purchase JFD's converters and amplifiers or to those who purchased BT equipment (R. 686-88).

Mr. Gilbert similarly testified (on deposition) to oral customer reports of JFD salesmen refusing to sell JFD antennas to BT customers when they bought BT products (R. 675-76).

Mr. Cohn similarly testified, with names of specific customers, as to JFD's tie-in sales policy (A. 364, 365).

Because of the truth of these activities, JFD has chosen to remain absolutely silent and has offered not one word of explanation.

The tie-in sales admitted by JFD's executive vice-president, Mr. Finkel, constitute an antitrust violation. See also, *Carbice Corp. of America* v. *American Patents Corp. and Dry Ice Corp. of America,* 283 U. S. 27, 75 L. Ed. 819 (1931); *Leitch Manufacturing Co., Inc.* v. *Barber Co., Inc.,* 302 U. S. 458, 82 L. Ed. 371 (1938); *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 86 L. Ed. 363 (1942).

It is not necessary to show an antitrust violation to establish misuse of patents by tie-in sales practices.

As stated in *Waco-Porter Corp.* v. *Tubular Structures Corp. of America,* 222 F. Supp. 332 (D. C. S. D. Cal. C. D. 1963)

> "It is clear that even a mere restriction on competition with the patented device itself is sufficient to constitute a patent misuse."

See, also, *Baldwin-Lima-Hamilton Corp.* v. *Tatnall Measuring Systems Company,* 169 F. Supp. 1 (D. C. E. D. Pa., 1958), aff'd 268 F. 2d 395:

> "its marketing policy . . . constituted a misuse of the Simmons patent. That misuse bars the enforcement of the patent . . . regardless of whether the 'tying' practices resulted in a violation of the antitrust laws."

To all this must be added the fact that JFD has described itself as "one of the world's largest producers of TV antennas" (D. Ex. 42—B-101 A. 549, R. 515); and as "the world's largest manufacturer of TV and FM antennas" (D. Ex. 42—J6 A. 573, R. 515), a statement which Mr. Finkel testified was "accurate" and "true" (D. Ex. 42, p. 22 R. 515). The activities complained of were, therefore, of the leading manufacturer and supplier in the field and were directed against Blonder-Tongue, a brand newcomer to the commercial antenna market.

As before pointed out, not only was Blonder-Tongue deprived by the District Court of a postponement to reassemble its customer witnesses, but *it was JFD's own deliberate actions* that inhibited other modes of proof and interfered with the very processes of the court:

> 1. The District Court found that "some records dealing with customers were found to be missing" (A. 87) when one employee (Balash), who had been "assigned . . . to personally investigate" the threats of JFD to customers, to reply to this suit (R. 511-2; 694-5), was "subsequently hired by JFD" (A. 87).

2. Just before the trial, JFD hired away Blonder-Tongue's West Coast sales representative, Graham Sisson—the West Coast being one of the places where there had been specific distributor customer coercion and where petitioner counted on testimony (see literature sent by JFD to Sacramento Electronics, D. Ex. 43, A. 576, R. 528).

Even without its full day in court, Blonder-Tongue succeeded at least in convincing the District Court that there was *some* evidence "which tends to support this argument" (A. 87).

We question the conclusion of law, therefore, that because this is what the District Court called "a normal business practice", it is proper to use a line of allegedly patented antennas as a club to force the purchase of unpatented related converter and booster equipment.

Admittedly the proofs aren't the strongest or most complete (thanks, in part, to the actions of JFD); but, as the District Court itself had to conclude, there was some evidence and nothing specific to rebut the same on the other side.

2. The Raiding.

The District Court's conclusion, that the JFD hiring away of antenna employees was not illegal since it represented a small fraction of the personnel turn-over, appears to represent a brand new principle of law, *unsupported by any authorities.*

The details of the nature of the personnel and the timing of their hiring by JFD were omitted from the Court's finding that "several persons formerly in Blonder-Tongue's employ were subsequently hired by JFD and that, after the departure of one of these, some records dealing with customers were found to be missing" (A. 87).

These details are uncontradicted in the record.

They show that several of these employees were *key men* in the Blonder-Tongue antenna business, and included the "organizer" of that business and even the co-inventor of the Blonder-Tongue patent in suit in this cause!

First, one Jerome Balash was the "organizer of Blonder-Tongue's complete antenna business . . . from the marketing standpoint" (R. 689) and later product manager in charge of antennas at Blonder-Tongue (R. 510); and, following the filing of this suit, was "assigned . . . to personally investigate" why the customers were not purchasing antennas, including the threats of JFD (R. 511-2; 694-5).

Though then on notice that Blonder-Tongue was trying to join JFD in this litigation, in the midst of Mr. Balash's investigation of customers and JFD threats to the same, Mr. Balash was hired by JFD.

The day after Mr. Balash left, a search was made for Blonder-Tongue's files of Mr. Balash's correspondence with the customers, but they couldn't be found (R. 512-514, 676-7, 689). These files included the reports relating to the activities of JFD in the market place that Mr. Balash had been assigned to investigate for the purposes of this counterclaim; and the Blonder-Tongue-IBM reports ending April 30, 1966, giving breakdown of customers, addresses and products sold, disappeared at the time of Mr. Balash's departure for JFD as well (R. 680-2, 688-9).

Mr. Balash's being hired away by JFD during his investigation for Blonder-Tongue of the activities of JFD in the market place that were hampering Blonder-Tongue's antenna program and the attempt to get evidence and testimony from witnesses, not only injured the sales activity of the Blonder-Tongue antenna program, but frustrated the obtaining of evidence for this suit.

But JFD was not content with hiring just Mr. Balash.

In the heat of this litigation, with the case set for trial, JFD hired away three other important Blonder-Tongue engineering employees: two engineers, Mr. Eduardo Elesandro, the "project engineer in charge of . . . master television antenna equipment division" at Blonder-Tongue and another (R. 518-9); and *Mr. Abraham Schenfeld, co-inventor of the Blonder-Schenfeld patent in suit in this counterclaim.*

The record shows how hampered Blonder-Tongue was in its proofs (and what interference this caused with the processes of the Court) as a result of the hiring away of co-inventor Schenfeld on the eve of the trial. Mr. Blonder testified (R. 504-5) that Mr. Schenfeld made the performance tests on the JFD antennas charged with infringement; and Mr. Blonder had no knowledge that qualified him to testify as to those particular tests! And Mr. Schenfeld was now in the "enemy" camp.

But even this was not enough in the campaign to prevent Blonder-Tongue's emergence in the antenna field and to hinder the proofs in this litigation. As before stated, JFD even lured away the West Coast sales representative of Blonder-Tongue, Mr. Graham Sisson (R. 519), just before the trial.

What other purpose could the hiring away of these *key* Blonder-Tongue employees have had, and at the critical times above discussed, except to compete unfairly with Blonder-Tongue and to hinder its proofs in this cause and interfere with the processes of the Court?

JFD has not offered one word of specific explanation of any of this.

If this is not illegal "raiding", it is hard to conceive what is.

The hiring away of key employees for such motives has certainly been held in the lower courts to be an actionable wrong. See, for example, *Sugar Creek Creamery Company* v. *Momence Milk Cooperative Assn.*, 75 USPQ 193 (D. C. N. D. Ill., 1947).

These wrongful acts of JFD have greatly impeded Blonder-Tongue's ability to compete in the antenna market and have seriously hindered its preparation for the trial. In addition to the damage done Blonder-Tongue, these acts have had the effect of frustrating justice by preventing the presentation to the Court of much of the evidence of JFD's wrongdoing.

3. The Fraud in the Patent Office and in Advertising.

It has been demonstrated before that the Mayes et al. patent, the basis of Re. 25,740 in suit, was secured by a fraud on the Patent Office in the filing of a misleading affidavit. The subsequent action of the Foundation, asserting the patent in an attempt to foreclose others from manufacturing log periodic home television receiving antennas, is a violation of Section 2 of the Sherman Act, 15 U. S. C. 2, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corporation*, 382 U. S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965).

It should also be observed that promptly upon the issuance to the Foundation of the improperly procured Mayes et al. patent, many ads appeared (D. Ex. 42, B-4, B 4A, A. 546, 7, R. 515) falsely claiming the log periodic formula to be patented, and *all with the name of the Foundation and/or University* prominently bannered in such ads, rendering the conclusion inescapable that this was part and parcel of a crude, unethical and improper conspiracy to defraud both the Patent Office and the public. This is more fully treated hereinafter.

The timing of these ads coincided with the Blonder-Tongue introduction of its antennas; and, as the record shows, resulted within "a few months" in customers refusal "to take on our line" (R. 520-1).*

4. Patent Mismarking.

In addition to falsely claiming the log periodic formula to be patented as just mentioned (D. Ex. 42-B-4, 4A, A. 546, 7, R. 515) to dissuade the trade from purchasing log periodic antennas from Blonder-Tongue or from any manufacturer other than JFD, the *exclusive* licensee of the Foundation, JFD listed patent numbers in its ads and on its antennas that simply did *not* relate to or cover those antennas—the so-called "mismarking" referred to by the District Court.

The record shows, without contradiction, that none of the antennas advertised by JFD in advertisements such as D. Ex. 42-B-108, A. 565, R. 515 was covered by any of the three patents exclusively enumerated right under the Mayes and Carrel LPV antennas advertised therein (Dyson 2,958,081, D. Ex. 66, R. 1023; DuHamel 2,985,879, D. Ex. 67, R. 1023; and Isbell 3,011,168, D. Ex. 65, R. 1023).†

More than this, in its answering brief before the District Court (p. 5), the Foundation conceded that JFD's advertising head and executive vice-president, Mr. Finkel

> "may have known as of April, 1964 (D. Ex. 42) that its commercial products were not covered by issued patents."

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* The proofs as to the extent and amount of damages were deferred until after the decision on the trial.

† Mr. Finkel, vice-president of JFD, admitted in his deposition, D. Ex. 42, pp. 43-45, R. 515, that none of the "three patents mentioned" in these ads were the patents of the "Mayes and Carrel" antenna. Patent numbers were placed on antenna boxes, also, D. Ex. 42, p. 28.

Indeed, Mr. Finkel's own letter of April 21, 1964 (D. Ex. 42-B-105, p. 2, A. 561, R. 515) so stated:

> "At the present time we are not selling any products that come under the Dyson, DuHamel and Isbell patents."

And yet, the uncontradicted evidence unequivocally shows that JFD advertisements *in this same April of 1964* and thereafter (for example, D. Ex. 42-B[1]13 and B106, A. 571 and 563, R. 515) used these very same three patent numbers in connection with the same advertised Mayes and Carrell LPV-11 and similar antennas which the Foundation itself has admitted, *supra*, "were not covered by issued patents." Even in 1966, these patents were still included in JFD advertising (D. Ex. 37, A. 542, R. 659).

Thus the "mismarking" was not innocent.

Contrary to the District Court's view of the law that such "mismarking" can be dismissed as merely of "minimal" effect (A. 85), false or overstated patent marking has long been recognized as an act of unfair competition. This was one aspect of the decision in *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416, 10th Cir., 1952, where Kobe gave wide publicity to the number of patents which it owned and "they were used to the limit in its attempt to stop Dempsey," page 424.

In the Seventh Circuit, Judge Evans criticized misrepresentations concerning non-existent patent protection, and refused to enforce trademark rights because of unfair business practices. *Perfection Mfg. Co.* v. *B. Coleman Silver's Co.*, 270 F. 576 (7 Cir., 1921).

In *Angel Research, Inc.* v. *Photo-Engravers Research, Inc.*, 223 F. Supp. 673 (D. C. Ill., 1962), Judge Perry held that the actions of Photo-Engravers Research, Inc. in attributing to a patent a scope which it did not have and in threatening members of the trade with the patent were

factors in the creation of a monopoly. Photo-Engravers Research, Inc. had also misused the patent by refusing to sell allegedly patented material to certain customers who wouldn't join the research group.

In another case involving the counterclaim defendant JFD, the United States District Court for the Eastern District of New York held allegations of false representations by JFD with respect to their antennas and those of another stated a cause of action both under the Patent Law, 35 U. S. C. 292, and Section 43a of the Lanham Act, 15 U. S. C. 1125a. *Channel Master Corp.* v. *JFD Electronics Corp.*, 260 F. Supp. 568 (D. C., N. Y., 1966).

The evidence with regard to false advertising and marking is clear. There can be no question regarding the applicability of the law.

Further, such false and overstated patent markings and claims serve to extend patents to cover an unpatented product, which appears to be a *"per se"* violation of the antitrust laws as to which no special damage need be shown, *White Motor Co.* v. *United States*, 372 U. S. 253, 259-60 (1963). Specific damage to Blonder-Tongue tied in to the period of these falsely marked advertisements has, however, been shown (R. 520-1, 675-6, for example).

False and overstated patent marking, done for the purpose of excluding others from the market, is an antitrust violation, as well (*Kobe* v. *Dempsey, supra; Angel Research* v. *Photo-Engravers Research, supra*).

Altogether apart from antitrust considerations, moreover, such false-marking use

> "of a patent to restrain competition with the sale of an unpatented product constitutes a misuse of the patent, and warrants denial of recovery to a plaintiff in an infringement action", *Surgitube Products Corp.* v. *Scholl Mfg. Co.*, 158 F. Supp. 540 (D. C. S. D. N. Y., 1958), p. 543; aff'd. 262 F. 2d 824 (2 Cir., 1959).

5. Improper News Releases.

The District Court found nothing wrong, as a matter of law, in the Foundation deliberately and knowingly bringing suit with improper venue and then issuing news releases of the same.

Some further details of the basic facts found by the Court, however, lead to an entirely different conclusion of law.

The uncontradicted record shows that at least two of Blonder-Tongue's distributor-customers received from JFD, after suit was filed herein, a set of three documents:

> JFD Sales Bulletin of April 19, 1966 (D. Ex. 43, A. 576, R. 528—XB6a; D. Ex. 46, A. 613, R. 530— XB5a);
> University of Illinois Foundation news release of April 7, 1966 (D. Ex. 43—XB6c; D. Ex. 46—XB 5b);
> Print of a newspaper clipping (D. Ex. 43—XB6b; D. Ex. 46—XB 5c).

JFD's Mr. Finkel specifically testified, D. Ex. 42, R. 515, p. 78, that the Foundation gave "authorization . . . to send" the above-mentioned Foundation news release (D. Ex. 43—XB 6c and D. Ex. 46—XB 5b) to the antenna distributors and representatives in the trade.

The JFD Sales Bulletin refers to five suits, using the name "Blonder-Tongue Laboratories, Inc." prominently at the top. It not only announces these suits, but threatens others:

> "The Foundation is taking vigorous action in the courts to sue all violators of the basic Log Periodic Patents."

Note the characterization of "basic Log Periodic Patents" —clearly intended to imply, as in the previously discussed misleading advertising campaign, that no one but JFD could make a log periodic antenna (when, of course, no such basic patent existed).

The context in which this JFD campaign was carried out, moreover, is important to these issues. Mr. Blonder testified, without contradiction, that distributor-customers also reported being threatened with suit "By JFD and the University of Illinois Patent Foundation" if the distributors "were to take on our line" (R. 520-1).

That he was aware that such threats were in fact made to such distributor-customers was conceded by Mr. Finkel of JFD at D. Ex. 42, R. 515, p. 74:

> "Q. Are you aware that salesmen and distributors of yours have made these comments?

[i.e., "if they handled anyone else's line of log periodic antennas, they would be sued"]

> "A. It might be they have made them. This is the normal kind of selling that goes on in the field, not just this one."

In this case: suits were used to coerce the trade into dealing with JFD exclusively; newspaper clippings of litigation and news releases announcing litigation and threats thereof were deliberately widely circulated in the trade and to customers of competitors, including Blonder-Tongue; and this suit was brought, knowingly without jurisdiction, merely to enable the issuance of a news release mentioning Blonder-Tongue under the letterhead of the Foundation, which was mailed to Blonder-Tongue's customers. This far transcends the proper use of patents and patent litigation.

Such publicity with regard to suits for patent infringement and threats of suits have long been held in the lower courts to constitute an act of unfair competition. A case in the Seventh Circuit, *Panay Horizontal Show Jar Co.* v. *Airdor Co.*, 292 F. 858 (1923), criticized the publicity given to a patent and a suit which had been filed but not yet heard. Judge Evans said (p. 859):

> "The practice of trying suits in newspapers or circulars, in order to scare or daunt competitors, is pernicious and apparently growing. While courts are always open to protect patentees or manufacturers who have established a business which is being unfairly assailed, they cannot permit or sanction the use of the court's name, in advance of adjudication (or falsely after adjudication), to harass or obstruct a rival. A patentee who resorts to such practices comes into court with unclean hands, and on that ground alone will be denied the relief to which he otherwise might be entitled."

To a similar effect is *Maytag Co.* v. *Meadows Mfg. Co.*, 35 F. 2d 403 (7 Cir., 1929).

H. S. Toulmin, Jr., in Patents and the Anti-Trust Laws of the United States, 1960, says:

> "Mass patent litigation and the sending of notices of patent infringement may be regarded as evidence of unfair competition. This unfair competitive method is aggravated where it is coupled with a general attack on a trade, both by patent notices and litigation." Vol. 4, page 696, Chap. 23, Sec. 23.1.

See also *Gerosa* v. *Apco Mfg. Co.*, 299 F. 19 (1 Cir., 1924); *Robbins* v. *Petersime*, 51 F. 2d 174 (10 Cir., 1931).

6. False Advertising.

The question here is whether the District Court is correct, as a matter of law, that widely disseminated advertising statements, e.g., that the log periodic formula had been patented, when such was not the case, were fair and proper.

Once more, the District Court's findings of fact omit many subsidiary findings necessary to determine the correctness of this legal conclusion.

With regard to the "formula" matter, the JFD ads contained further statements, not mentioned by the Court, clearly showing a deliberate intention to give the reader

the impression that the District Court admitted the reader might get: namely, "that JFD had patented the whole concept of log-periodicity." (A. 85). For example, the February 10, 1964, Radio & Television Weekly ad (D. Ex. 42—B4 and 4A, A. 546 and 547, R. 515) refers to

"The Patented Log-Periodic Cellular Formula".

Note, also, the statements that "Only the JFD Log Periodic LPV operates according To The Patented Log-Periodic Cellular Formula", and "Do Not Be Misled By Log-Periodic Imitations", and "No other so-called Log-Periodic Antenna can work like the JFD Log Periodic LPV". This same "no other antenna" libel is also repeated as late as 1965, D. Ex. 42—J6, A. 573, R. 515.

And all this under color of the name of the University itself, and even (in D. Ex. 42—B4A, A. 547, R. 515), the picture of Prof. Mayes and the legend "Antenna Research Laboratories of the University of Illinois".

Such false representations of the coverage of the Foundation patents, under the name of the University, clearly told the trade that they could not buy a log periodic antenna from anyone other than JFD—*since every log periodic antenna follows the log periodic formula!*

After the damage had been done to Blonder-Tongue in the market place (R. 520-1, 675-6), and after willingly collecting royalties from JFD for sales attained by these patently illegal advertising tactics over many months, the Foundation itself finally complained to JFD:

> "Paragraph 4 is *untrue.* The Log-Periodic LPV formula is *not patented.*" (Emphasis added.) (D. Ex. 42—B-104, p. 2, A. 560, R. 515.)

While a certain amount of "puffing" is recognized in the selling arena, where numerical figures of performance are presented to the customers in technical fields, it is not "puffing" to put in false figures; it is fraud.

But that is just what JFD has done in this case. In its Radio Electronics article of June, 1963 (reprinted for advertising use), D. Ex. 42—B-102, A. 553, R. 515, JFD baldly stated that

> "the LPV-11 . . . maintained a front-to-back ratio of 35 db. . . ."

This was repeated in advertisement D. Ex. 42-B-109 (upper right-hand corner of second sheet), A. 567, R. 515.

The significance of this figure resides in the fact that it numerically rates the performance of the antenna in receiving the desired television signal, much as horsepower rates an automobile's performance.

The record shows, however, that tests—*as to which JFD introduced no contrary evidence obviously because they were true*—demonstrated that the JFD LPV-11 fell far short of producing the claimed *"35 db"* and, indeed, produced only

> *"about 10 to 12 db"* (A. 346).

The significance of this is that, in the same 1963-1964 period, Blonder-Tongue was advertising the *true* figures of performance of its log-periodic DART antenna (JFD Ex. 23, p. 7, for example, R. 731).

Now appear these false JFD performance figures, under color of the name and prestige of the University of Illinois, impressing customers and potential customers that the JFD LPV antenna was *3.5 times better than it actually was*—and, of course, thus far above the Blonder-Tongue antenna in performance.

What customer would not be persuaded that an antenna designed by the University of Illinois Antenna Laboratory and with such tremendous performance figures—and all covered by patents and even a patented formula—was the one to buy, rather than that of a "Johnny-come-lately" in the antenna field, Blonder-Tongue?

Finally the Foundation realized that JFD was using its name and that of the University "as a gimmick" to support its "publicity" and "new peak of performance" claims, and threatened to "cancel" the license (D. Ex. 42-B-112, A. 570, R. 515); but irreparable damage had been done in the marketplace by this extensive, unchecked advertising campaign for almost two years.

7. Summary as to the Unfair Competition and Antitrust Counterclaims.

It has been shown that the total pattern or scheme of acts performed by the Foundation and JFD constitutes unfair competition (and antitrust violation) under the law, irrespective of whether the individual acts are separately illegal.

It has further been demonstrated that the District Court's legal conclusions as to the propriety of the individual acts standing alone are decidedly in error.

And, finally, it has been shown that several of these acts are misuses, barring enforcement of the Foundation's patent here in suit, even had it been valid and infringed.

Though petitioner has not had its full day in court as to those issues, it appears that sufficient facts have been found by the District Court, and others are uncontradicted in the record, to entitle Blonder-Tongue to judgment on Counterclaims I and II, as a matter of law.

QUESTION 5.

(Re Petitioner's Blonder-Schenfeld Patent.)

The Court of Appeals for the Seventh Circuit conceded that, in treating the counterclaim patent of petitioner,

> "the district court did not describe the scope and content of the prior art, identify the differences between the prior art and claim . . . nor state the level of ordinary skill in the pertinent art".

This, indeed, is precisely what the Supreme Court has recently held in *Graham* v. *John Deere Co., supra,* must be found by the trial court in order to apply the standard of "obviousness" under Section 103 of the patent statute.

The Court of Appeals went on to treat this, however, as merely a discretionary requirement and not an absolute one and sustained the District Court on its finding of "obviousness" without making a single one of these determinations itself and in complete contravention of the express instructions from the Supreme Court.

The mere conclusion by the District Court (A. 89) that

> "claim 5 of the Blonder-Tongue patent was obvious at the time it was made and is therefore invalid,"

is entirely unsupported by any special or subsidiary facts or findings whatsoever, in direct contravention of Rule 52(a) F. R. C. P. See, for example, *B. F. Goodrich Company* v. *Rubber Latex Products, Inc.,* 400 F. 2d 401, 402 (6 Cir. 1968).

While showing knowledge (A. 76) of the requirement for specific fact finding as to the matter of "obviousness" under 35 U. S. C. 103, recently reiterated by the Supreme Court in *Graham* v. *John Deere Co., supra,* the District Court failed, in connection with the Blonder-Schenfeld patent (as distinguished from the way it treated the University of Illinois patents) to make a single finding as to "the scope and content of the prior art", "differences between the prior art and the claims at issue", "the level of ordinary skill in the pertinent art", or any other findings to support its conclusion.

It is perhaps in order to point out that, absent the fact that this Supreme Court has taken jurisdiction principally because of other issues, unless there were the safeguard of *Triplett* v. *Lowell,* petitioner would have no redress from the grossly inadequate treatment afforded his patent in the lower courts.

On this record, moreover, the District Court, even without the necessary findings that constitute due process, asserted the legal conclusion that statutory presumption of validity of petitioner's patent was overcome by some possible but unexplained combination of the teachings of fifteen pieces of prior art, allegedly indicating "obviousness" as a matter of law.

But the legal conclusion to be drawn from a situation where so many references have to be combined allegedly to anticipate an invention is quite to the contrary.

As earlier stated by the Court of Appeals for the Seventh Circuit itself in a similar factual situation in *Minneapolis-Honeywell Regulator Company* v. *Midwestern Instruments, Inc.*, 298 F. 2d 36, 38 (7 Cir., 1962):

> "defendant designated thirteen prior art patents in addition to the twenty references considered by the Patent Office. Such an approach (sometimes designated as 'Shotgun') has been held to be indicative of invention or of the futility of prior art to solve the problem. *Ric-Wil Co.* v. *E. B. Kaiser Co.*, 7 Cir., 179 F. 2d 401, 404, Cert. den. 339 U. S. 958, 70 S. Ct. 981, 942 L. Ed. 1369."

Thus, as a matter of law, it appears that the lower courts reached the wrong legal conclusion as to "obviousness", apart from their failure to make the supporting findings required by the law.

This, indeed, is further borne out by uncontradicted testimony of Mr. Blonder and documents in evidence showing that:

> 1. There was a long-standing problem of "ghosts" with prior art television antennas (including the "log periodic linear and V-type antennas" of the Isbell and Mayes et al. patents here in suit). (Blonder-Schenfeld patent, D. Ex. 26, col. 1, line 20 on A. 526, R. 477; testimony of Mr. Blonder, R. 481-2.)

2. Numerous proposals were tried through the years, including "crossed harnesses", "multiple connections requiring rivets" and the structures of the prior art cited by the District Court at A. 88-9, to try to minimize these effects; but, notwithstanding, the "problems . . . have always existed" (R. 481, 509).

3. The Blonder-Schenfeld solution involved a radical departure from what the District Court characterized as the Isbell patent concept of a "*substantially planar*, parallel arrangement to form an antenna array" (emphasis added), in that

> "Unlike prior-art arrays, including Yagi arrays, conventional log-periodic structures and the like, first and second pluralities of horizontal dipole elements 5, 7, 9, . . . 11 and 5′, 7′, 9′ . . . and 11′ are provided, lying in corresponding *first and second vertically spaced horizontal planes I and I′* containing the respective longitudinal conductors 1 and 1′" (emphasis added) (D. Ex. 26, col. 2 at top A. 526, R. 477)

instead of the Isbell coplanar arrangement; and a

> "parallel-wire transmission line TL is connected at looped terminal portions 1″ and 1‴" (D. Ex. 26, col. 2, line 17 on A. 526, R. 477),

in a certain uncommon and critical geometric and rigidly held arrangement that amazingly obviates electrical field pattern aberration because of "wind motion" or otherwise (R. 483-488; P. Ex. 10, R. 123, D. Ex. 26 A. 525, R. 477).

4. No one in the "television industry" prior to this invention introduced such a structure (R. 487, 509); no prior publications or writings disclosed such a structure (R. 488-9).

5. By relying on 35 U. S. C. 103 ("obviousness") and not 35 U. S. C. 102 (disclosure or direct anticipation), the District Court tacitly conceded that none of

the cited prior art (A. 88-9) actually discloses the claimed structure.

6. The fact that the Blonder-Schenfeld structure, unlike the Isbell and Mayes et al. coplanar structures, solved these problems and still worked so well electrically, was a matter that *"happily surprised"* Mr. Blonder (a masters-degree engineer) and his engineering associates (R. 488); and, indeed, was a matter that Mr. Robert Heslin (a senior electronics engineer and *JFD's own witness*) conceded was "a surprise" both to him "at that time" and to Mr. Campbell, the technical editor of Q. S. T., an electronics publication (R. 723).

7. The Patent Office fully considered the prior art of Isbell and Mayes et al. A. 527 so that the issuance of the Blonder-Schenfeld patent constitutes a considered and deliberate finding that this was an unobvious invention over the work of these investigators; and though all three of these engineers have been inventing for the University of Illinois, and Mayes has been designing antennas for JFD as well, the fact is that the Blonder-Schenfeld construction never occurred to them (i.e., was not obvious) until after Blonder-Tongue showed the way.

8. *After* Blonder-Tongue introduced into the market its antennas with the Blonder-Schenfeld patent construction, JFD promptly redesigned its antennas, abandoned the "cross harness" and other schemes (D. Ex. 42-B-106 and 108 A. 563 and 565, R. 515) and adopted the Blonder-Schenfeld construction with relatively widely spaced booms and the critical parallel-wire transmission line mounting and feed (D. Ex. 27, R. 491; D. Ex. 27A, R. 499; D. Ex. 37, A. 542, R. 659; D. Ex. 42, p. 53, R. 515; JFD Ex. 25; R. 734, R. 446, 500-2, 761).

There thus appears to be sufficient uncontradicted evidence of unobviousness meeting the Supreme Court's test in the *Graham* case, *supra*. This, coupled with the District Court's erroneous conclusion of law in contradiction to the doctrine of the *Minneapolis-Honeywell* case, *supra*, would appear to permit this Supreme Court even on this record, to find the Blonder-Schenfeld patent valid and infringed.

CONCLUSION.

Apart from the significant issues of whether the Isbell patent is or is not valid and enforceable, and whether petitioner's counterclaims are or are not sustainable, this case involves circumstances demonstrating the degeneration of the standards of legalized fair play

(a) before the administrative agency (the Patent Office),

(b) in the market place,

(c) in the action of parties litigant before the court, and

(d) in the conduct of the courts themselves,

—in short, issues embracing all facets of our society concerned with the operation of industrial property rights.

We wonder whether an opportunity such as this has previously been presented to this Supreme Court to redefine legal conduct that has too long been allowed to continue unchecked to the point where, as illustrated in this case, lawyers and engineers find nothing wrong in misrepresenting to the Patent Office, in blatant harrassment of competitors, in hiring away key witnesses during litigation, and in performing almost every conceivable act of unfair competition ranging from deliberately misleading and false advertising, false representation of the scope of patents in such advertising, false representation of the

rights of others to make similar products, false patent marking, threats under color of patents to force not only sale of the patented line but unpatented items, as well, and using the medium of a large number of suits and publicity announcing and threatening the same, deliberately to stifle competition.

Not only do we witness this conduct as "normal" in today's society, but we further witness in this case the misuse of power by the courts, with a shocking deprivation of rights inherent in due process of law, which is supposed to be the guaranteed birthright of us all.

As this Supreme Court well knows, America is facing revolutionary times, and it is hungrily searching for worthwhile substance to believe in. We cannot find that substance if we excuse misrepresentation in the Patent Office; if we excuse misuse of patents to restrain competition; if we excuse misconduct by the parties in hindering the process of the courts themselves by acts that have resulted in the suppression of evidence; and if we excuse clear misconduct and misapplication of due process in the courts.

We are looking to this Supreme Court to reset our standards of conduct in the administrative agencies, the market place and in the courts, such that America may again have some substantial measure of purpose, direction and integrity.

Specifically, we request in this cause the over-ruling of the finding of the Court of Appeals that the Isbell patent represented invention, that it is infringed by petitioner's antennas, and/or that it is enforceable under the circumstances herein of misrepresentation, unfair practices and unclean hands.

Petitioner further seeks redress by way of a finding of unfair competition and antitrust violation in the barrage of unfair and illegal practices engaged in by JFD, in con-

sort with the plaintiff, to try to maintain a monopolistic position in the antenna field—which, indeed, very nearly resulted in putting the petitioner out of business altogether.

Lastly, we seek in this Supreme Court the same safeguards of a fair and complete trial and the right to the same type of findings of fact and due consideration in connection with petitioner's patent, that the District Court showed it knew it was supposed to give in connection with the patents of the plaintiff.

Respectfully submitted,

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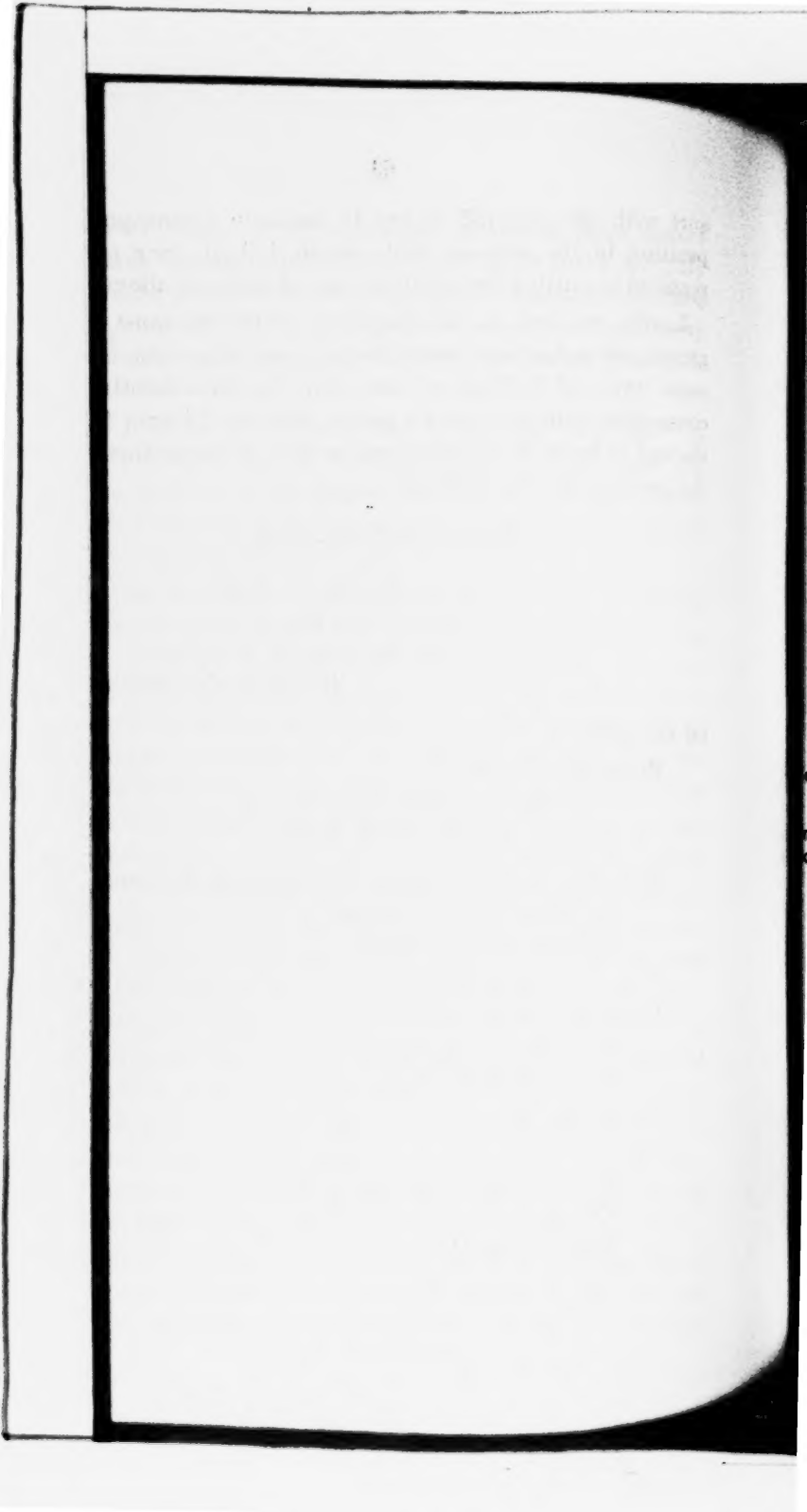
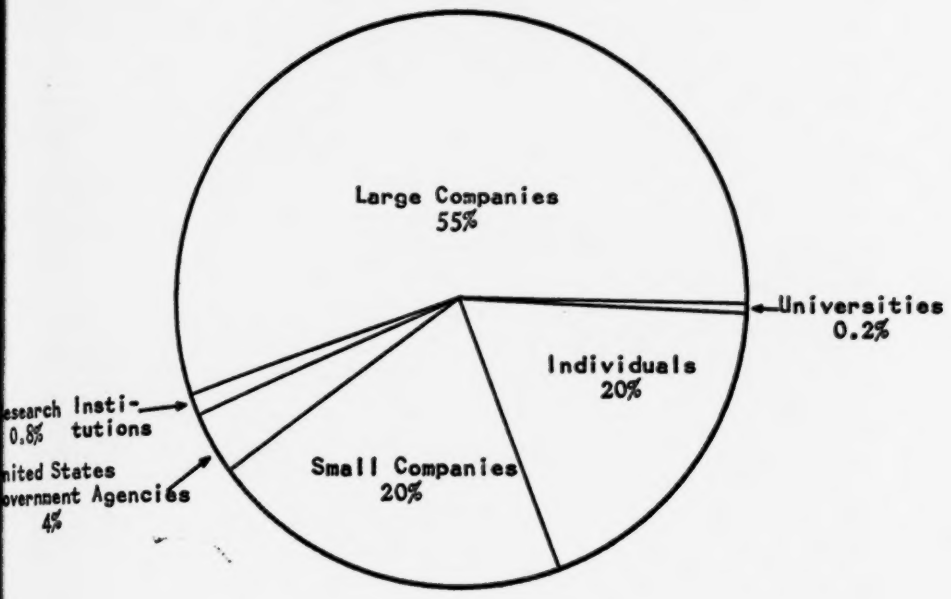


ADDENDUM I.

Current Sources of Patentable Invention

in the United States
(in sample periods 1968 - 70)



Samples

rge Companies	2450	United States patents
all Companies	900	
esearch Institutes	40	(Universities 10)
ndividuals	860	
nited States overnment Agencies	200	

FROM: A STUDY OF CURRENT WORLD WIDE SOURCES OF ELECTRONIC AND OTHER INVENTION AND INNOVATION, WITH EMPHASIS UPON UNIVERSITY-STIMULATED HIGH-TECHNOLOGY SCIENCE-BASED ENTERPRISES, by Robert Harvey Rines, unpublished.

Figure I

COPY BOUND CLOSE IN CENTER